THE

# MONTHLY LAW REPORTER.

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### TOWNSEND'S LIVES OF TWELVE JUDGES.[1]

We have long delayed noticing this excellent work, which we have read more than once with great pleasure. It contains well-written sketches of twelve Judges among the most eminent who flourished during the latter half of the last century, and the first half of the present. They were originally published in the Law Magazine, and have been received with high praise by the readers and the critics of Great Britain and America. These biographies are gracefully written; they are filled with sparkling anecdotes; and we hardly know where a more entertaining work can be found. Even where the facts are familiar, it is pleasant to retrace the lives of the mighty masters, who have expounded the laws, and swayed the senate, of England.

We are first introduced to the great name of Francis Buller, the worthy associate of Mansfield, and the hardest worker that ever sat in a British court. To the public, Buller is generally known as a severe judge in criminal cases, and as the justice who presided at the trial of Donellan. A brief but excellent account of this case is given by Mr. Townsend, and with his summing up we cordially agree.

"We may totally dissent from the opinion of those who believe in his innocence, and accuse Mr. Justice Buller as the shedder of innocent blood; we may feel assured that there was never a case brought into a court of justice, in which so many circumstantial facts were elicited, all tending to

[1] The Lives of Twelve Eminent Judges of the Last and Present Century. By William C. Townsend, Esq., M. A., Recorder of Macclesfield. In two volumes. London.

an irresistible conclusion of guilt; and yet be by no means surprised at the sympathy which the fate of even this atrocious criminal excited. Englishmen love fair play, and their honest prejudices were aroused on learning that the chief witness for the prosecution had been privately examined; that a sort of private rehearsal had taken place; that an eminent counsel was to be brought down special to insure a conviction, and that the judge openly avowed his certainty of the prisoner's guilt. They believed that a reasonable chance of escape was not afforded to the culprit; that the humane wish, God send you a good deliverance, was withheld from him; and their sympathies, however abhorrent of his crime, closed freely around the doomed criminal."

In commenting upon the much-ridiculed dictum of Sir Francis Buller, that a husband might lawfully chastise his wife with a stick no larger than his thumb, Mr. Townsend tells a good story of an Irish judge.

"Having been called upon to decide the grounds of a divorce sued for by a wife against her husband, who had given her a good beating, the venerable civilian delivered an opinion, that with such a switch as the one he held in his hand, moderate chastisement was within the husband's matrimonial privilege. This legal maxim occasioned so much offence or alarm to a lady to whom the doctor had been for some time paying his addresses with a fair prospect of success, that she peremptorily dismissed the asserter of so ungallant a doctrine. Dr. Coghill, as may be guessed from his opinions, died unmarried. 'The civil law,' says the more courtly Blackstone, 'allowed the husband for some misdemeanors,' *flagellis et fustibus acriter verberare uxorem*, with whips and clubs sharply to strike a wife; but with us, in the politer reign of Charles the Second, this power of correction began to be doubted, and may now be positively denied. The sly remark of the commentator is still too true, that the lower rank of people, who were always fond of the old common law, claim and exert their ancient privilege."

The Judge had a fine opportunity of learning the popular opinion of his severity.

"Early one morning Sir Francis Buller had gone wrapt up in a great coat to a horse-dealer's to bargain for a horse he had fancied. It was trotted out, and went tenderly on the off-foot, a defect, as jockeys well know, best detected at first starting. The keen judge called out to the dealer to come back, as the animal would not do. 'Why you are as bad as old Buller,' retorted the jockey gruffly, 'you condemn him without trying him!'"

But the severity of Mr. Justice Buller was only after the verdict had been rendered. No judge during the trial of a cause ever held the scales of justice more equal between the government and the prisoner. It was said of him, "That no person, if guilty, would wish to be tried by him, but that every one, if innocent, would prefer him for his judge." Nothing could better than this describe the opinion entertained of his discernment and impartiality. An anecdote is related of him by his biographer, that illustrates these traits of his character.

"On one occasion a man was tried before him for a capital offence; the witness for the prosecution deposed strongly against the prisoner, and as the case was going on, a grand juror threw down a note to his counsel, stating that the witness had sworn quite the reverse before the grand jury that morning. The statement was immediately made known to the court, and Judge Buller ruled contrary to precedent, that the grand juror should be allowed to appear as a witness. He did appear: the prisoner was acquitted, and the witness was afterwards convicted of perjury."

To all students of the Term Reports, Judge Buller is known for the soundness of his judgments, and the conciseness with which his opinions were expressed. His despatch of business was wonderful. "It was no rare feat for him to clear a paper of twenty-six causes in one long day." "Velocity in horsemanship," says Bentham, "saw itself rivalled by velocity in judicature." He was the youngest man ever appointed to the King's Bench, being elevated to office at the age of thirty-two. The change in his position after the appointment of his successor, is well described by the author. "His opinions had swayed implicitly the judicial minds of his brethren; they were now exposed to the angry bay of Kenyon, and the snappish yelp of Grose."

Lord Kenyon's life is next in succession. His patient and persevering labor, his brilliant success, his wisdom in law, and his blunders in Latin, are well told. He is truthfully sketched as he lived, firm in upholding the dignity of courts, and the laws of social morality; crushing the adulterer and the libeller, hating dishonesty, and sparing no form of wrong. To lawyers, he is best known for the reverence which he felt for precedent, for the firmness with which he upheld the maxims of the common law, and for the boldness with which he overruled the decisions of Mansfield, when they were contrary to the settled principles of jurisprudence.

Several rich specimens of Lord Kenyon's eloquence are given. "This is the last hair in the tail of procrastination," he exclaimed to a faulty defendant. "Go to chancery, *abi in malam rem*," was his well-known advice to an importunate suitor. Again, "The allegation is as far from truth as 'old Bolerium from the northern main,' a line, I have heard or met, God knows wheer." Some amusing illustrations of Kenyon's economy are collected in this sketch.

"A brother lawyer having mentioned to Jekyll that he once went down into Lord Kenyon's kitchen, and saw the spits as bright and unused as

when they came from the maker: 'Why do you mention his spit,' said Jekyll, 'when you know nothing turns upon that?' Upon another occasion, the same punning satirist, with reference both to his petulance and penuriousness, said, 'It is Lent all the year round in his kitchen, and Passion Week in his parlor.'"

"A hatchment was put upon Lord Kenyon's town residence after his death, with the motto, '*Mors janua vita*,' the last letter written *a* by a mistake of the painter. This was pointed out by Jekyll to his successor and by no means good friend, Lord Ellenborough. 'Mistake!' said his lordship, 'it is no mistake; he left particular directions in his will that the estate should not be burdened with the expense of a diphthong.'"

"The exhibition of shoes, frequently soled, afforded proof of the attention which he paid to economy in every article of his dress. Once in the case of an action brought for the non-fulfilment of a contract on a large scale for shoes, the question mainly was, whether or not they were well and soundly made and with the best materials. A number of witnesses were called, one of them, a first-rate character in the gentle craft, being closely questioned, returned contradictory answers; when the chief justice observed, pointing to his own shoes, which were regularly bestridden by the broad silver buckle of the day, 'Were the shoes any thing like these?' 'No my lord,' replied the witness, 'they were a good deal better and more genteeler.' The court was convulsed with laughter, in which the chief justice heartly joined."

We must pass quickly over Lord Alvanley, whose characteristic name, Richard Pepper Arden, was once translated by a Frenchman into "*Mons. Poivre Ardent.*" Some of the anecdotes recorded of Lord Alvanley might well have shocked his scrupulous predecessor.

"Lord Alvanley was once trying a cause in the hall of the House of Lords, and an act of Parliament was in question. A learned serjeant quoted a particular section of the act. Lord Alvanley said there was no such clause in the act.

"'Why but, my lord, here it is,' said the serjeant.

"'Never mind, I tell you, I know it is not there,' retorted the judge.

"'I beg your lordship's pardon, but here it is in the book: read it.'

"The learned judge at length took the book, and having read it, exclaimed:—

"'Oh true, here it is sure enough, as sure as God is in Gloucester.'"[1]

"A friend of his was startled one evening when the domestics, according to custom, had been summoned to attend prayers read by Lord Alvanley, by his suddenly pausing and calling out, 'Will no one stop that fellow's damned fiddling?' One of the servants, it appeared, had remained behind and was amusing himself in a more agreeable manner than at the family devotions. But his master carried anger as the flint bears fire; the spark went out the moment it had kindled, and the kind-hearted judge bore no resentment."

Want of space compels us to leave the sketches of Lord Loughborough and Sir Vicary Gibbs without a notice. Our next extract is from the life of Lord Ellenborough, whose

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[1] Swift in one of his verses upon Whiston, writes:—

'Who proved, as sure as God 's in Gloucester,
That Moses was a great impostor.'

fame has been injured by his harsh manner, and by his unreasonable opposition to a reform of the penal code.

"So wilfully blind are the wisest men to the defects of a long established and favorite system, that Serjeant Hawkins declared that "those only who took a superficial view of the crown law could charge it with severity," at a time when old women might still be executed for witchcraft; and Lord Ellenborough declaimed against the necessity of amelioration at a period, too recent, when prisoners might be pressed to death for standing mute and refusing to plead; when women might be flogged, to the outrage of female delicacy, and burnt to death in due form of law; when the horrors were not yet abrogated that formed part of the sentence of high treason; when criminals were slain by the capricious fury of the mob in the pillory; when flagrant but merciful violations of their oaths were in constant use among jurymen; when the twelve judges might be called into the open air to try a wager of battle, which time and civilization had strangely failed to abolish, and the sentence of death was pronounced with all its dread formalities by the reluctant judge, who had no intention of carrying the edict into execution. These and many other enormities are at length, thank God, expunged from the roll of Parliament, and blotted out forever. But the long-continued and ill-advised opposition to Romilly s temperate measures of reform have aroused a spirit of amending the penal laws, equally dangerous with the previous extreme of over-caution and severity. A spirit of spurious compassion seems to be fast pervading the lower branch of the legislature; introducing crude and hasty measures, and lavishing that pity, which was rightly bestowed upon the larcener, on the stealthy incendiary and daring burglar.

"Consider," said a late eloquent writer, "the popular feelings at this moment against capital punishment, what is it, but continuing to burn the woods, when the country actually wants shade and moisture? Year after year men talked of the severity of the penal code, and struggled against it in vain. The feeling became stronger and stronger, and, at last, effected all, and more than all, which it had at first vainly demanded; yet still, from mere habit, it pursues its course, no longer to the restraining of legal cruelty, but to the injury of innocence, and the encouragement of crime, and promoting that worse evil, a sympathy with wickedness justly punished, rather than with the law, whether of God or man, unjustly violated."

If the first portion of this extract shows that reform was necessary in England, the latter portion may well be applied to the sentimental philanthropists of our own time and country. The evil done by the sanguinary code of Great Britain lives after the amelioration of that code, and the defunct enormities of foreign jurisprudence are collected to excite a morbid sympathy for abandoned criminals, and to defeat the execution of wholesome laws.

A number of anecdotes illustrate the ultra conservatism and the abrupt manner of this great Judge.

"The instant submission paid by all ranks to the authority of a chief who ruled the court and its precincts with despotic sway '*cuncta supercilio moventis*,' is said to have been once exhibited in a very ludicrous manner. A storm of wind and rain had driven a regiment of Westminster volunteers to seek for shelter in the hall, when his attention was attracted by the

clatter of the musketry. 'What is the cause of that interruption, usher?' vehemently demanded Lord Ellenborough 'My *Lud*, it is a volunteer regiment *exorcising*, your *Ludship!*' Exorcising! we will see who is best at that. Go, Sir, and inform the regiment that if it depart not instantly, I shall commit it to the custody of the tipstaff!' The volunteers retired with unmilitary speed.

"It is related of him when attorney-general, that he had been listening with some impatience to the judgment of a learned judge, afterwards his colleague, who said, 'In —— *v.* —— I ruled so and so.' 'You ruled,' muttered the attorney-general in a tone of suppressed displeasure, 'you rule, indeed! you were never fit to rule any thing but a copy-book.'

"When it was suggested to a survivor of Lord Ellenborough's school, that a bill for abolishing contingent remainders had been brought into Parliament, he exclaimed in a transport of legal horror, 'Abolish contingent remainders! Why not repeal the law of gravitation?'

"When Mr. Park had been moved in some case that appealed to the feelings, to repeated exclamations, and had called Heaven to witness, &c. while addressing the jury — 'Pray, Sir,' said Lord Ellenborough, 'pray, don't swear in that way here in court!' When another counsel, too much addicted to self-praise, had declared in the course of his address, that such things were enough to drive one from the profession of the law — 'Don't threaten the court,' said his lordship, 'with such a terrible calamity!'

"An eminent conveyancer, who prided himself on having answered thirty thousand cases, came express from the Court of Chancery to the King's Bench to argue a question of real property. Taking for granted rather too rashly, that common lawyers are little more acquainted with the Digest of Cruise, than with the laws of China, he commenced his erudite harangue by observing 'that an estate in fee-simple was the highest estate known to the law of England.' 'Stay, stay,' interrupted the chief justice with consummate gravity, 'let me write that down.' He wrote and read slowly and deliberately the note which he had taken of this A. B. C. axiom, 'An estate in fee-simple is the highest estate known to the law of England; the court, Sir, is indebted to you for the information.' There was only one person present who did not perceive the irony, and that was the learned counsel who incurred it. But though impervious to irony, it was impossible even for his self-love to avoid understanding the home-thrust lunged by the judge at the conclusion of his harangue. He had exhausted the year-books, and all the mysteries of real property law in a sleepy oration which effectually cleared the court, insensible alike to the grim repose of the Bench, and the yawning impatience of the ushers, when at the close of some parenthetical and apparently interminable sentences, the clock struck four, and the judges started to their feet. He appealed to know when it would be their *pleasure* to hear the remainder of his argument. 'Mr. P.' rejoined the chief, 'we are bound to hear you and shall do so on Friday, but pleasure has been long out of the question!'

"Another barrister was advancing rapidly into the regions of poetry in a grave argument at banc, and observing, 'It is written in the large volume of nature,' when the judge instantly recalled his wandering imagination by the caustic query, 'In what page, pray?'

"A Quaker not wearing the peculiar dress of his sect was once examined as a witness before him. When about to be sworn, he refused, and required to be examined on his affirmation. Lord Ellenborough inquired if he was a Quaker, and was answered in the affirmative. 'Do you mean,' said his lordship, 'to impose on the court by appearing here in the disguise of a reasonable being?'"

The life of Lord Erskine is the most entertaining and the most instructive of these sketches. "Sailor, soldier, lawyer, peer and divine," he was undoubtedly the first of legal orators, and he won a nobler title to admiration, as a defender of freedom against the aggressions of power and the bloody doctrine of constructive treason. Every lawyer will delight to trace the course of this most brilliant of advocates, from his daring and successful defence of captain Baillie, to his noble exertions in behalf of Stockade, and his unequalled triumphs in the cases of Hardy and Tooke.

An excellent specimen of the facetious style, which Erskine knew so well how to use, is given in this sketch.

"The auctioneering flourishes of a Mr. Christie once afforded Erskine a favorable opportunity for winning a verdict by dint of laughter from the jury. He was conducting a case for the plaintiff, in an action to recover the deposit money for an estate, which his client had credulously purchased on Christie's representations of its beauties. In one of those florid descriptions which abounded in all his advertisements, the house was stated as commanding an extensive and beautiful lawn, with a distant prospect of the Needles, and as having amongst its numerous conveniences an excellent billiard-room. 'To show you, gentlemen,' said Erskine, 'how egregiously my client has been deceived by the defendant's rhetoric, I will tell you what this exquisite and enchanting place actually turned out to be, when my client, who had paid the deposit on the faith of Mr. Christie's advertisement, went down in the fond anticipations of his heart to this earthly paradise. When he got there, nothing was found to correspond to what he had too unwarily expected. There was a house, to be sure, and that is all, — for it was nodding to its fall, and the very rats had instinctively quitted it. The building stood, it is true, in a commanding situation, for it commanded all the winds and rains of heaven. As for lawn, he could find nothing that deserved the name, unless it was a small yard, in which, with some contrivance, a washerwoman might hang half a dozen shirts. There was, however, a dirty lane that ran close to it; and perhaps Mr. Christie may contend that it was an error of the press, and therefore, for "lawn" we must read "lane." But where is the billiard-room? exclaimed the plaintiff, in an agony of disappointment. At last he was conducted to a room in the attic, the ceiling of which was so low that a man could not stand upright in it, and therefore must, per force, put himself into the posture of a billiard-player. Seeing this Mr Christie, by the magic of his eloquence, converted the place into a "billiard-room.' But the fine view of the Needles, gentlemen, where is it? No such thing was to be seen, and my poor client might as well have looked for a needle in a bottle of hay!'"

A bitter epigram on Justice Grose is also recorded.

> "Qualis sit Grotius judex uno accipe versu,
> Exclamat, dubitat, stridet, balbutit et — errat."

But we must leave Erskine, for one, whose character and views were far different from his. The life of Lord Eldon closes the work. The space intervening between the sketch of the witty advocate and the learned doubter

is filled up with the biographies of Lords Redesdale, Tenterden and Stowell, and of Sir William Grant.

One of Eldon's cases, in which he appeared for the defence when he was plain John Scott, is worth quoting.

"A man had been prosecuted for stealing salmon out of the river, and acquitted by the jury on the ground that his offence only amounted to a trespass, the law holding salmon to be animals *feræ naturæ*, neither tamed, nor reclaimed. A constable, who heard this doctrine laid down most emphatically from the bench, went straightway, with a cleverness which deserved the place of chief thief-taker of Bow Street, to fish, caught a salmon and marked it, by inserting a twig through its snout. This salmon was immediately returned to the river, and unluckily for the poacher found its way into his basket the following morning. He was again committed for the larceny, tried and convicted, the salmon thus ornamented and distinguished being no longer *feræ naturæ*, but property."

He lived to exercise greater skill in attempting to procure the conviction of Hardy and Tooke, but not with equal success.

The chancellor's wit was once exhibited at the expense of Erskine, who had boasted in the House of Lords that the multitude drew him home every night in his chariot. Lord Eldon maliciously added, that his friend forgot to mention that on the last occasion when the mob took the horses from his carriage they forgot to bring them back.

Lord Eldon fought hard against the amelioration of the penal statutes, and against the repeal of the test act. When the repeal bill passed, he exclaimed that the sun of England had set. The reform bill also called forth the earnest opposition of the venerable peer. Indeed, any thing, that savored of reform, excited the indignation of the old conservative.

One of his sneers at the phraseology of the chimney-sweeper's relief bill, contains a statement which has been recently denied by one of our judges. The bill spoke of "any female, girl or woman." Lord Eldon thought, it would be impossible to find any female, who was not a girl or woman. The Municipal Court of Boston have recently quashed a complaint for an assault upon "a female," on the ground that the word might refer to a female dog.

More than once his obnoxious views exposed him to danger. An amusing instance of this was often related by himself.

"In the early years of his chancellorship, during one of the London riots, his home in Bedford Square, the venerable No. 5, was surrounded by a mob; several of the more riotous broke in, and one penetrated as far as the room in which he was sitting. Lord Eldon collared him on his

entry and said, 'If you don't mind what you are about, my man, you'll be hanged.' The visitor replied, 'Perhaps so, old chap, but I think it looks now as if you'll be hanged first;' and added the old peer, 'I had my misgivings that he was in the right.'"

We should be pleased to make farther extracts from this interesting sketch, and we should have been glad to have laid before our readers some of the anecdotes which we find in the life of Lord Stowell. But we must lay down the book, heartily commending it as the best of light reading for a professional man. The style is pure and elegant. We are never disturbed by the egotism which disfigures the pages of Lord Campbell's "Lives." That noble author, when he does not obtrude himself into the text, is sure to appear in a foot-note. Mr. Townsend is content to represent the great men, whose lives he writes, without giving us any hints of his own greatness. He has produced a very readable book, and so far as we have had an opportunity to examine his facts, they are accurately as well as neatly stated, — a compliment, which cannot always be paid to Lord Campbell's biographies.

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## Recent American Decisions.

*Court of Appeals, Kentucky, January,* 1853.

FERRY v. STREET.

Clarissa, held as a slave under the laws of Kentucky, was taken to Philadelphia, and was there retained more than six months with the permission and approbation of her owner, who knew that, by the statute of Pennsylvania, she would be entitled to her freedom in that State, if retained therein longer than six months. She was afterwards carried back to Kentucky, and was there sold to a person having a full knowledge of these facts. In a suit instituted by her to obtain her freedom, it was *held*,

1st. That Clarissa became free by being retained in Pennsylvania longer than six months; and that she retained and was entitled to her freedom, when removed to Kentucky.

2d. That the purchaser, being acquainted with the facts at the time of the purchase, was in no better condition than the vendor, and could not hold her as a slave.

In hearing an appeal case, where a paper, the contents of which was not marked "filed" by the clerk of the Circuit Court, have been copied into the record, and were manifestly used in evidence by the court below, they will be treated as evidence by this court.

THE facts in this case sufficiently appear in the opinion of the Court, which was delivered by CRENSHAW, J. — In the spring of the year 1838, Clarissa, a woman of color, the property of Mrs. Trigg, at the instance of her mistress, accompanied Mrs. Alexander to the city of Philadelphia.

The object of Mrs. Alexander, in visiting this city, was to consult physicians there upon the subject of her eyes which were much diseased, and, if necessary and advisable, to place herself under their treatment. Mrs. Alexander being a near relative of Mrs. Trigg, being in a very helpless condition, in consequence of defective sight, and Clarissa being a very faithful and trustworthy servant, Mrs. Trigg determined to send Clarissa with Mrs. Alexander to Philadelphia, to take care of and wait upon her. But, before they departed on their journey, Mrs. Trigg sent for Jeptha Dudley to consult him in regard to the laws of Pennsylvania, and what effect they might have upon slaves sent by their owners into that State. Dudley visited Mrs. Trigg according to her request, and informed her that he was no lawyer, but his impression was, that if Clarissa should remain in Pennsylvania as long as six months, she would be entitled to her freedom. Mrs. Trigg, as Dudley states, then said that she had no calculation that Mrs. Alexander would return in less than a year, and she intended to send Clarissa with her to remain until Mrs. Alexander's return, because she could not trust Mrs. Alexander with any other person; that she did not believe Clarissa would avail herself of the laws of Pennsylvania, because she had a husband and children in Kentucky, and because Clarissa knew that she was to be free at her (Mrs. Trigg's) death; that Clarissa having been the patient and attentive nurse of Major Trigg in his last illness, he desired her and her child to be purchased by Mrs. Trigg, and liberated at her death, and that she had promised to do so.

Mrs. Alexander and Clarissa departed for Philadelphia, and Clarissa remained there more than six months. She then returned to Kentucky according to the united wish of herself and Mrs. Trigg, and went again into her service. After this, Mrs. Trigg having occasion to borrow a sum of money from Miss Thompson, (now Mrs. Ferry,) her adopted daughter, who seems to have resided with her, executed to her an absolute bill of sale for Clarissa. Dudley states, that, notwithstanding the absolute character of the bill of sale, it was intended only as an evidence to Miss Thompson of the debt, and to secure her in its payment; and that, before Mrs. Trigg's death she enjoined on him, who was to be her executor, to raise the means from her estate and discharge the debt to Miss Thompson, that Clarissa might be free. Mrs. Trigg made her will, liberating

her other slaves, and making Miss Thompson her devisee. And Dudley says he would soon have raised the means from the hire of the other negroes to redeem Clarissa, had it not been for the interposition of Miss Thompson, who desired the liberated slaves to be discharged from further service. Although Miss Thompson was the devisee of Mrs. Trigg, the amount of property realized by her from the estate, does not appear to have been sufficient to discharge the debt to Miss Thompson of $500, which constituted the consideration of the bill of sale to her of Clarissa. It is proved that Miss Thompson was cognizant of the desire and intent of Mrs. Trigg to liberate Clarissa. But, the only ground upon which Clarissa bases her right to freedom, necessary to be considered, is her remaining in Pennsylvania more than six months when she accompanied Mrs. Alexander to Philadelphia.

There is some discrepancy in the testimony, in regard to the time which Mrs. Trigg expected Clarissa to remain in Philadelphia with Mrs. Alexander, and as to her willingness for her to remain as long as six months; but we think the proof establishes the fact, not only that she expected Clarissa to remain as much as six months, but that she was willing for her so to remain. Clarissa, then, was not only sent to Pennsylvania by Mrs. Trigg, but remained there with her consent and approbation for the period of six months and longer, with a knowledge, on her part, of the laws of that State upon the subject of slaves remaining there longer than six months. And the question is, Do these facts entitle Clarissa to her freedom, to obtain which, she has instituted this suit against Ferry and his wife, who was the late Miss Thompson to whom the bill of sale mentioned was executed?

The statute of Pennsylvania, upon which Clarissa relies, as conferring freedom upon her, was passed in the year 1780; and the 10th section of that act, being the one relied upon, is in the following words:

"And be it further enacted, that no man or woman of any nation or color, except the negroes or mulattoes who shall be registered as aforesaid, shall, at any time hereafter, be deemed, adjudged, or holden, within the territories of this Commonwealth, as slaves or servants for life, but as free men and free women; except the domestic slaves attending upon delegates in Congress from the other American States, foreign ministers and consuls, and persons

passing through, or sojourning in this State, and not becoming residents therein, and seamen employed in ships, not belonging to any inhabitants of this State, nor employed in any ship owned by any such inhabitant; provided, such domestic slaves be not aliened, or sold, to any inhabitant, nor (except in the case of members of Congress, foreign ministers and consuls) retained in this State longer than six months."

Notwithstanding the many suits which have been brought to this court, prosecuted by persons of color to obtain their freedom, the precise question involved in this controversy has not been decided. It has been repeatedly held by this court, that a slave sent, or permitted to go to a State where slavery is not tolerated, for a temporary purpose only, does not thereby acquire a right to freedom in Kentucky; but that, whatever might be his *status* or condition in the free State to which he had been sent, or carried, not for residence, but for merely a temporary purpose, his condition as a slave, upon his return to Kentucky, would not be changed. *Rankin* v. *Lydia*, (2 Mar. 476); *Bush's Representatives* v. *White*, (3 Mon. 104); *Graham* v. *Strader*, (5 B. M. 179); *Tom Davis* v. *Tingle*, (8 Ib. 546–547); *Collins, et al.* v. *America*, (9 Ib. 565); *Maria* v. *Kirby*, (12 Ib. 542). In these cases, the effect of the laws of other States where slavery is not recognised at all, not even for a moment, was discussed and considered, and the consequence of a temporary or transient sojourn merely in such States, by the consent or approbation of the owner, was declared to be, not that the slave thereby became entitled to freedom in this State, but that, upon his return here, his condition should be as it was before such temporary sojourn — that of a slave.

But, the question, whether a slave taken to a State, where, although the inhabitants, whether black or white, are free, a privilege is extended to sojourners who come from slave States, to hold their servants as slaves until a particular period, beyond which they are not allowed to do so, has not been decided; or, in other words, if a State, into which a slave is voluntarily sent or carried by the owner, though for a temporary purpose only, has declared by statute that a slave remaining there a certain length of time shall be free; this court has not decided what shall be the effect or operation of such a law upon the condition of a person of color, who may, in our courts, claim to be free

by virtue of such a statute. This question has been expressly left open. This court, in the case of *Maria* v. *Kirby*, *ubi supra*, say: "If any State were to enact that any slave brought within its limits by the authority of the owner, and permitted by him to remain there six months, or three, or even one, should be free, there might be some reason for saying that such a law should operate permanently, even upon the rights of strangers, because they would have an opportunity of knowing its provisions and avoiding its consequences." And, in the case of *Collins* v. *America*, *ubi supra*, this court used this language: "These remarks, and the reasoning of this opinion, are made without reference to a case in which the foreign law may directly prohibit the introduction of a slave, or the retaining of him within the State for a certain period, and declare the consequences of either of these, and we decide no question as to the effect of such a law."

In this case, the owner of Clarissa was apprised of what the law of Pennsylvania was, when she sent her slave there, and determined to risk the consequences. That law was, that the slave might be brought there, and her condition be unchanged for the period of six months; but that, if she remained there longer than that period of time, she should be deemed a free woman. Mrs. Trigg was informed that such was the law of Pennsylvania, and she resolved to hazard the consequences. And we think that in such a state of the case, the condition of Clarissa in that State, after remaining in that State longer than six months, should follow her to Kentucky, and be her condition here. Under the circumstances, she was free there, and should be free here. This result was voluntarily incurred by her then owner, of which Mrs. Ferry was apprised, and having taken her bill of sale for Clarissa with a full knowledge of the circumstances, neither she nor her husband has any cause to complain, especially as she was also apprised that it was the intention of Mrs. Trigg, that, at her death, or as soon thereafter as the sum of $500 could be raised out of the means of her estate to redeem Clarissa, (the raising of which sum, according to Dudley, was prevented by herself,) Clarissa was to be free.

The authority not being accessible, we have not had an opportunity of examining the case of *Stewart* v. *Oakes*, (5 Har. & Johnson, 107). But we understand from the

reference to this case, made by Wheeler in his Law of Slavery, page 338, that the decision of the court in favor of the freedom of the plaintiff, was based upon a statute of Virginia similar in its provisions to that of Pennsylvania. Wheeler says the court held, that a slave carried at different periods to Virginia, by his owner, residing in Maryland, and employed working at his stone quarries, the several periods amounting to one year, such slave was entitled to his freedom under the law of Virginia.

It is contended, that the statute of Pennsylvania, not having been marked as filed by the clerk of the Circuit Court, it ought not to be regarded by this court. It is, however, copied into the record, and was manifestly used in evidence by the court below, and we think it should make no difference that it was not marked, "filed" by the clerk.

Wherefore the decree is affirmed.

*Reed*, for appellant.

*Harlan* and *Callender*, for appellee.

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### *Circuit Court of the United States, District of Rhode Island, November Term*, 1852.

Before Justices CURTIS and PITMAN.

WILLIAM H. GREENE *v.* NATHAN M. BRIGGS ET AL.

The Rhode Island statute, passed at the May session, 1852, entitled "An Act for the Suppression of Drinking-houses and Tippling-shops," considered, and in certain particulars declared unconstitutional.

THIS was an action of replevin in the usual form, to obtain certain liquors from the defendants, Nathan M. Briggs and William H. Hudson, who, under an order issued from the Court of Magistrates in the city of Providence, had been directed to destroy the same, under the provisions of the "Act for the Suppression of Drinking-houses and Tippling-shops." The original complaint, dated September 3d, 1852, was in the form required by the act.[1] A search war-

[1] To Samuel W. Peckham, Esquire, one of the Justices of the Court of Magistrates in the City of Providence, in the County of Providence, in the State of Rhode Island and Providence Plantations.

Daniel K. Chaffee, Warren G. Slack, and George W. Wightman, voters in the city of Providence, in said county, on oath complain in the name and behalf of the State, that they have reason to believe, and do believe, that at said Providence, on the third day of September, 1852, with force

rant was issued, according to the prayer of the complaint, to examine the premises wherein the liquors were alleged to be kept, with an order to seize the liquors found, and hold them in some place of security until the final action of the court; and to summon the owner or keeper of the liquors, to appear and show cause why the liquors should not be adjudged forfeited, and be destroyed, and why he should not be ordered to pay a fine of twenty dollars and costs. Upon the same day the officer made return upon this warrant, that he had seized the liquors, and summoned one Holbrook as the owner or keeper thereof, as directed. On the 7th of September, Holbrook put in his answer, averring that he held the liquors which had been seized, as the agent of the plaintiff, a citizen of New York, on storage, and that no sale had been made, nor was any sale intended to be made, since the act went into operation. On the same day the plaintiff, styling himself as of New York, filed his claim to the liquors in writing, averring that they were deposited on storage in the buildings where they were seized, before the act took effect, and that they were not kept or deposited for sale in the city of Providence, contrary to the provisions of the act in question; and demanding that they should be restored.

After a long hearing, the court (September 27) adjudged the liquors to be forfeited, and on the same day issued the order to destroy, and placed the same in the hands of the defendants for execution. But before the order was exe-

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and arms, spirituous or intoxicating liquors are kept or deposited, and then and there intended for sale, by a person to the complainants unknown, who is not authorized to sell the same in said Providence, under the provisions of the act entitled "An act for the suppression of drinking-houses and tippling-shops," in the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with the cellars and yards belonging to said buildings, against the Statute and the peace and dignity of the State.

Wherefore they pray advice, and that process may issue, and that the said premises may be searched, and that the owner or keeper of said liquors may be summoned to answer to this complaint, and be further dealt with relative to the same, according to law.

Dated at Providence, this 3d day of September, A. D., 1852.

D. K. Chaffee, Geo. W. Wightman, Warren G. Slack.

Providence, *ss.*

In Providence, this 3d day of September, A. D., 1852, personally came D. K. Chaffee, Geo. W. Wightman, and Warren G. Slack, subscribers to the above complaint, and made oath to the truth of the same Before me,

Samuel W. Peckham,
Justice of the Court of Magistrates.

cuted, the liquors were taken out of the possession of the defendants by the United States marshal, by virtue of the replevin writ in this case.

The provisions of the State Constitution, and those portions of the act in violation thereof, sufficiently appear in the opinion of the Court.

The hearing in the cause was had at Providence, at the November term of the Circuit Court, and the case was held under advisement until the 30th December, when Judge Pitman read the opinion of the Circuit Judge, and delivered his own.

*Jenckes*, *Ames* and *Carpenter* for plaintiff.

*James M. Clarke*, Esq., for defendants.

CURTIS, J. — This is an action of replevin for a quantity of wine and spirits alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend for their validity upon an act of the General Assembly of the State of Rhode Island, passed at its May session in the year 1852, and entitled "An act for the suppression of drinking-houses and tippling-shops."

The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the Constitution of the State, and therefore void, and so the taking and detention complained of are not justified.

The plaintiff is a citizen of the State of New York. Under the Constitution and laws of the United States, he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode Island. An adjudication upon his rights may, and in this case does, involve important questions arising under the constitution and laws of the State: but in such a case it is our duty to determine them; a duty which we should neither seek, nor avoid, but perform.

The Constitution of Rhode Island (art. 1, sec. 15) declares:

"The right to the trial by jury shall remain inviolate."

The 10th section of the same article is as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against

him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."

Taking these two sections together, it may be said of them in general, that while the 15th section recognises the existence of the right of trial by jury, and makes effectual provision for its preservation as it existed when the Constitution was formed, the 10th section declares not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding which are therein prescribed and defined. In other terms, in civil causes a trial by jury is to be had in those classes of cases in which it had been practised, down to the time when the Constitution was formed, and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be devised by the Legislature, without impairing the right itself. But in all criminal cases the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

In order to decide whether those parts of this act, necessary to sustain the avowry, are in conflict with these fundamental laws, we must have a clear view of what the act contains; and as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require: and I shall then consider, whether the proceedings thus authorized and required, are in harmony with the Constitution of the State.

Under this act three voters, in the town or city where the complaint is made, may make a complaint in writing under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act. It is not required that any particular person should be named in the complaint, as the person intending to sell such liquors contrary to law, nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the

county, one of whom is to proceed to search the premises described in the warrant, and if any spirituous or intoxicating liquors are there found, he is to seize, secure and keep them, until final action shall be had thereon. The officer is further required to summon the owner, or keeper of the liquors seized, if known to him; but there is no other provision for giving notice to the owner, or possessor, prior to an adjudication of forfeiture. There is a provision, that in case the owner is unknown to the officer, the liquors shall not be destroyed, until they shall have been advertised for two weeks, to enable the agent of any town duly authorized to sell such liquors, to appear and claim them, and upon making due proof of title the liquors are to be delivered to him and not destroyed. But this has no application to any other owner, and the law expressly requires the justice to adjudge a forfeiture if the owner fail to appear.

Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale, contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed and inflict a fine of twenty dollars, or if this fine be not paid, imprisonment for thirty days, upon such owner or keeper. An exception is made in favor of imported liquors, contained in their original packages, but the burthen of proof is put upon the party appearing, to make out this defence. If the person claiming the liquors shall appeal to the Court of Common Pleas, he is required to enter into a recognisance, in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such, by a fine of one hundred dollars, or in default of its payment, by imprisonment for sixty days; and he is also subjected to increased penalties on a second conviction.

On reviewing these proceedings it will be seen, that in order to obtain a trial by jury, the party must give security in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs which may be adjudged against him; and must subject himself to the

hazard of having the fine, inflicted by the justice of the peace, increased five-fold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons.

To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and in my opinion it is not only essentially unjust, but in conflict with that clause of the Constitution which secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. Natural right requires that no man should be punished for an offence, until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed by all just minds as tyrannical: for it would treat the innocent, who are unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends.

And it is equally clear that such a law would not be "the law of the land" within the settled meaning of that important clause in the Constitution. Certainly this does not mean any act which the Assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American Constitutions, has been, that they require "due process of law:" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it unless it is proved. Lord Coke, giving the interpretation of these words in Magna Charta, (2 Inst. 50, 51,) says, they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. *Hoke* v. *Henderson*, (4 Dev. R. 15); *Taylor* v. *Porter*, (4 Hill's R. 146, 147); 3 Story, Com. on the Const. 661. 2 Kent, n.

It follows, that a law which should preclude the accused from answering to and contesting the charge, unless he should first give security in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs,

and which should condemn him to fine and forfeiture unheard, if he failed to comply with this requisition, would deprive him of his liberty, or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power.

And if this would be the character of a law, which made the right to any trial dependent on such a condition, can it be maintained that to prescribe such a condition does not impair the right to a trial by jury? In such a case the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial, as the prescribed constitutional means of determining whether he is to be punished. A condition which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial, if prescribed as a condition for his having it.

The 14th section of the 1st article of this Constitution declares:

"Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person, shall be permitted."

Undoubtedly this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence until the accusation is proved, but points out the security of the person that he may be tried, as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment any law which disregards these principles, and introduces a new object, viz., the security of the payment of the fine and costs, and denies a trial by jury unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so, there would be no limit to legislative control over this right, for if one onerous condition may be imposed, so may any number, until the right becomes so difficult of attainment, that it ceases to be a common right, and can be enjoyed only by a few.

I find it equally difficult to reconcile the increase of penalties upon a conviction after an appeal with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the Legislature considered this the appropriate penalty for the offence. Cer-

tainly it cannot be said that the offence is aggravated by the accused having claimed a trial by jury. For what then is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Here also it is manifest that this right is not secured by the Constitution, but is wholly under the control of the legislative power, if it can annex penalties to the exercise of the right.

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property, and summon the owner or keeper, if known to him. But the arrest of property, to compel an appearance, is a known and effectual mode of proceeding against the owner of that property. Indeed all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained and adjudged forfeited, if the owner or keeper fail to appear, and if he do appear that he shall be fined, or imprisoned, if found guilty, it has brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary, and it recognises them as property, by providing for the appointment of public agents to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held in some town in the State for sale within that town. Indeed the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be adjudged forfeited," "and the owner shall pay a fine," &c., are applicable only to property, and clearly imply that there is deemed to be some title to be divested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner.

This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law, authorizing this prosecution, with another requirement of the 10th section of the 1st article of the Constitution of the State, already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged, and in the case at bar the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept, or deposited in several buildings which are mentioned, or in the yards or cellars thereto belonging, and are intended for sale in the city of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time and claimed by different persons, were referred to, whether the plaintiff who owned these liquors, or some other person in whose care they were left had this unlawful intent, is not stated or shown by the complaint. There being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause? When the Constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one in particular, is not such an accusation as will satisfy this clause of the Constitution. It stands in the same article which demands a conformity to "the law of the land," that is, due process of law, and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. *Sanford* v. *Nichols, et al.* (13 Mass. R. 286); *Read* v. *Rice*, (2 J. J. Marsh. R. 45); *Commonwealth* v. *Davis*, (11 Pick. R. 432); *Commonwealth* v. *Phillips*, (16 Ib. 211.) If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful intent to sell them, perhaps this might be sufficient; though when it is borne in mind that this is a proceeding *in personam* as well as *in rem*, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the

offence. But here it does not appear the owner was intended to be charged. The complaint alleges only that some person has this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrong-doer, who had the possession, does not appear. Nor is there any description of the property, capable of distinguishing it from all other of like kind, and consequently of identifying the owner, if he should appear, as the person intended to be charged. The only description given is, that the property is liquors, spirituous or intoxicating, and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out, as it did in this case, that more than one person had or claimed to have such liquors, in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection? or under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial to be had of all claimants who may appear, however numerous they may be? The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers, till he finds some one guilty, and there stop, and discharge the rest, or proceed and convict two or three or any other number, if he find evidence enough, under a complaint against one only?

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has also a right to be so charged, that when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and under the direction of the court, shall apply the law to all mixed questions of law and fact.

Now if the owner of liquors seized, reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell over five gallons, and no such fact is required to be, or can be put to the jury to be tried. Yet upon this fact, the judgment that he is guilty of a distinct offence, and the higher punishment appropriate to that offence, are rested. So that he is to be convicted of this higher offence without being charged with it, and without a trial by jury of one of the facts essential to constitute it.

It is urged however, that nevertheless this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would nevertheless be a criminal prosecution within the meaning of this clause in the Constitution, and the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt, whether a complaint, stating that only some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, *non constat*, that the liquors seized are those referred to, or that their owner or any person to whom he had intrusted the possession, had any unlawful intent. It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to show, that if true, the appropriate punishment should be inflicted. Yet here, all that the complaint avers may be true, and yet the property of the plaintiff never have been held for sale in Providence, by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offence. It is only the accusation which is to be tried, and therefore if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty as to be bad for that cause.

But it is not possible thus to separate the proceedings, under this act, against the property, from the proceedings against the person, on appeal. The court is to order the property to be destroyed only in the event, "if the final decision shall be against the appellant." If there is no accusation upon which the appellant can lawfully be tried, there can be no final decision against him, and the property cannot be destroyed.

When this writ of replevin was served, this property was held under an order of forfeiture which was invalid for two reasons: First, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his

property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions which the Legislature had no constitutional power to impose.

In general, a judicial act is not void, but voidable only, and therefore it is necessary to consider whether this order comes within that class of acts which are voidable only by some appropriate legal proceeding in the same case, or was absolutely void.

An order made by a justice of the peace concerning a matter not within his jurisdiction, is void, and he, and all ministerial officers who execute that order, are trespassers. *Wise* v. *Withers*, (3 Cranch, 331); Cowp. 140; 7 B. & C. 536; 5 M. & S. 314; 11 Con. 95; 7 Wend. 200.

Such an order confers no authority to detain property, and is not a defence to an action of replevin by its owner. The inquiry therefore is, whether the magistrate had jurisdiction to make this order; and I am of opinion that he had not.

It has already been stated that this is a criminal prosecution. So far as this law attempts to confer jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the Constitution, and is wholly inoperative.

The Legislature may confer on justices of the peace power to punish offences, but it must be so done as to preserve unimpaired the right of trial by jury, otherwise the whole proceeding is void, *ab initio*. The Constitution declares that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." The act now under consideration provides that the right shall not be enjoyed in all criminal prosecutions, but, under this act, only in those cases in which security shall be given to pay all fines and costs.

It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void; because an appeal, in a criminal case, can exist only by force of a statute; and if the statute has given it only on certain conditions, the magistrate must execute his judgment, and cannot allow the appeal, and the appellate court cannot entertain it, unless those conditions are complied with. In substance,

it is a grant of final jurisdiction to a justice of the peace in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the Constitution of Rhode Island.

I am of opinion, also, that the complaint in this case was so defective as to render all proceedings under it void. Here also the rule is, that if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings, and while it stands they who act under it are not trespassers. But this is not an authorized legal proceeding in which an error has occurred. The complaint is in the form required by the act. The difficulty is, that the act has authorized a criminal prosecution, founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the Constitution, is inoperative, and it seems to be a necessary conclusion, that it confers no jurisdiction to receive and proceed upon such a complaint.

This may be illustrated by supposing a law authorizing a criminal prosecution without any complaint. In such case there would be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint, and one which does not satisfy this requisition of the Constitution, which therefore is no legal complaint, and is not "due process of law" within the definition by Lord Coke of the words "law of the land" in *Magna Charta.*

It has long been settled, *Martin* v. *Marshall,* (Hob. 63,) that the magistrate must not only have a jurisdiction of the subject-matter, but of the process. And if the law conferring jurisdiction is fatally defective, as respects the process, which is the foundation of the jurisdiction, the jurisdiction does not exist. *Grunder* v. *Raymond et al.* (1 Con. R. 40.)

For both these reasons, I am of opinion that the proceedings before the Court of Magistrates were inoperative to divest the owner of this property of his legal rights, and consequently neither the taking nor detention are justified by the avowry.

Several other questions have been argued at the bar in this case, but I do not find it necessary to consider them. They involve important rights under the Constitution and laws of the State. If any case should come here for judgment, requiring their decision, I shall pass upon them. This case is determined without doing so.

My opinion is, that there should be a judgment for the plaintiff, upon the demurrer, and if he claims damages for the taking and detention, their amount must be assessed by a jury.

PITMAN, District Judge, said he fully concurred in the opinion of Mr. Justice Curtis, and added:

The law in question was no doubt intended by many good men to promote the welfare of the community; but if this good cannot be accomplished except by the sacrifice of those principles which are so essential to secure our rights and liberties, we cannot hope for security because we are under a popular government. The despotism of numbers is quite as much to be dreaded as the despotism of one.

It is not lawful to do evil that good may come, and (if I may be here allowed to say so) it is not expedient. If good men disregard the vital principles of the Constitution, how can they expect that bad men are to be controlled by law?

There are other features of this law, which struck me at the hearing as a violation of the constitutional rights of the citizen.

The right of trial by jury, affected as it is by the conditions and obstructions which are annexed to the claim of this right by other sections, by the 9th section is rendered of less value to the accused, not only by declaring that no person engaged in the traffic of selling liquors contrary to this act "shall be competent to sit upon any jury in any case arising under this act," but by the mode of ascertaining the fact. The Constitution provides that "No man in a court of common law shall be compelled to give evidence criminating himself." Art. 1, sec. 13.

This law authorizes the court to inquire of the juror who may be challenged on this account: it is true the law says "He may decline to answer;" but what then? Is the fact to be proved by other evidence? No; his silence is considered as sufficient proof, and he is excluded accordingly. He is therefore compelled to answer if he does not wish to be excluded as unworthy to sit as a juror, or does not wish to be considered as concerned in a traffic which may be considered as infamous.

The maxim of the common law recognised by the Constitution is, that every man is to be presumed innocent until he is proved to be guilty.

The whole spirit of this law appears to me to be at variance with the rights of property as well as person.

The Legislature has no right, by an act, to confiscate the property of the citizen; it may be forfeited for a violation of law, but this must be done without affecting the rights of the owner thereof to a jury trial. But the object of this law does not appear to be so much "for the suppression of drinking-houses and tippling-shops," as its title would seem to import, as for the destruction of intoxicating liquors — because they may be injurious to the community. But those who drafted the law no doubt knew that this could not be done without making compensation to the owner thereof, as the Constitution of Rhode Island and most of the other State constitutions provide that private property cannot be taken for public use without just compensation. To evade this provision it is made criminal to have this kind of property, not merely in "drinking-houses and tippling-shops," but "in any store, shop, warehouse or other building," &c. (sec. 11) with intent to sell the same, and by what manner of process and how it is to be destroyed we have seen — evidently with a view to evade the trial by jury. Such an evasion is as illegal as a denial of this right, and if such a law is to be justified it can only be by adding another provision, by which the owner shall be compensated for the destruction of his property.

Lord Coke, in his Commentary upon the 29th chapter of Magna Charta, says (2 Inst. 48,) "5. No man destroyed," &c.

"Every oppression against law, by color of any usurped authority, is a kind of destruction, for, *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud:* and it is the worst oppression that is done by color of justice."

In page 51, he says:

"Against this ancient and fundamental law (referring to Magna Charta), and in the face thereof, I find an act of Parliament made (11 H. 7, cap. 3,) that as well justices of assize as justices of peace (without any finding or presentment by the verdict of twelve men), upon a bare information for the King before them made, should have full power and authority by their discretions to hear and determine all offences and contempts committed, or done, by any person, or persons against the form, ordinance, and effect of any statute made, and not repealed, &c. By color of which

act shaking this fundamental law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Edm. Dudley, being justices of peace throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected and they made masters of the King's forfeitures."

"But at the Parliament holden in the first year of H. 8, this act of 11 H. 7, is recited and made void and repealed, and the reason thereof is yielded, for that by force of the said act it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the King's subjects to their great damage and wrongful vexation; and the ill-success hereof, and the fearful ends of these two oppressors should deter others from committing the like, and should admonish Parliaments, that instead of this ordinary and precious trial *per legem terræ*, they bring not in absolute and partial trials by discretion."

Judgment was then entered for the plaintiff by order of court, with one dollar damages by agreement of parties.

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*Supreme Judicial Court of Massachusetts, Middlesex, January, 1853, Nisi Sittings, at Boston.*

CYRIL COBURN *v.* JOHN C. PALMER.

*Commitment of Debtor on Execution — When a Discharge of the Judgment.*

A judgment creditor arrested a judgment debtor upon execution, and the debtor gave a bond for the prison limits in due form, and afterwards committed a breach of the bond by not surrendering himself according to the conditions thereof. The creditor sued the surety on the bond, but the surety pleaded infancy, and was discharged. He then brought suit against the debtor on the original judgment, after the time for suing him upon the bond had elapsed; and it was *held*, that the action could not be maintained, as the judgment, under this state of facts, was discharged by the commitment of the debtor.

THE case was heard upon the following agreed statement of facts.

This action, commenced July, A. D., 1851, is an action of debt upon a judgment recovered by Coburn against the defendant, at the September term of the Court of Common Pleas, in said county, A. D. 1847, for $38.62, debt or damages, and $42.77 cost of suit. Execution issued on the

judgment October 27, 1847, and Palmer was committed to jail thereon, January 4, A. D. 1848. On the same day, Palmer, as principal, and Isaac A. Chamberlain, as surety, made and duly executed a joint and several bond, for the liberty of the prison limits as provided by law, which bond was in every respect conformable to the requirements of the statute. The bond was on the same day left with the jailer for the creditor, and the jailer thereupon released Palmer from imprisonment on the execution.

Palmer did not surrender himself at the expiration of the ninety days, nor during that time, and was not lawfully discharged, and did not fulfil the conditions of said bond, and the same became broken. Afterwards, and within a year after the breach of the bond, Coburn took the bond from the jailer, and caused an action to be commenced thereon against Chamberlain, the only surety therein, which action was entered at the June term of the court, 1848. Chamberlain pleaded infancy; a guardian *ad litem* was appointed for him, and at the trial a verdict was found for Chamberlain upon that issue, and judgment was rendered in his favor against the plaintiff, with costs, at the September term of the court, 1848.

No action has been commenced against Palmer upon the bond, and more than a year has elapsed since the breaches thereof, and the bond has never been paid nor satisfied.

The judgment upon which this action is founded has never been paid, satisfied, reversed nor annulled, and is in full force, unless the same is discharged or satisfied by the proceedings aforesaid.

Such judgment is to be entered in this case, as, in the opinion of the court, the law requires upon the foregoing facts.

*D. S. & W. A. Richardson*, for the plaintiff.

*Abbott & Brown*, for the defendants.

The opinion of the court was delivered by

Metcalf, J. — A commitment of a debtor in execution is, by the common law, a discharge of the judgment. And it is doubtful whether there were any exceptions to this rule of law, besides those of the debtor's escape from prison, without the sheriff's consent, and his obtaining by fraud, the creditor's consent to his release from prison. These two cases are admitted exceptions to the old common law rule. 3 D'Anv. Ab. 336; Com. Dig. Escape, E; *Mounson* v. *Cleyton*, (Cro. Car. 240, 255); *Baker* v. *Ridgway*, (9

Moore, 114); *Little* v. *Newburyport Bank*, (14 Mass. 443.) But statutes were passed, in England, in the reigns of James the I. and William the III., which authorized the arrest on a new execution, of a party who should be set at liberty by privilege of either house of Parliament, or who should escape from prison "by any ways or means howsoever;" and which also authorized a creditor, or his legal representatives to sue out a new execution against the property left by a debtor who had died whilst in prison. (Sts. 1 James I., c. 13; 21 Ib. I., c. 24; 8 & 9 Wm. III., c. 27.) These further exceptions, confirmed if not created by these statutes, we suppose to be, so far as they are applicable to our condition, a part of the common law of Massachusetts. And in the case of a debtor's escape, our Rev. Sts. c. 97, § 72, have also provided that the creditor may have a remedy against him by a *scire facias* or an action of debt on the judgment. But a commitment in execution is a discharge of the judgment when the creditor consents to the debtor's being released from prison, though the consent be given on terms that are not afterwards complied with; or upon the debtor's giving new security, which afterwards proves to be worthless; or though the release from imprisonment be upon the debtor's express agreement that he shall be liable to be taken again on execution, if he fail to fulfil the terms on which he is released. In none of these cases can the creditor, (unless circumvented by fraud,) maintain an action on the judgment, or lawfully take out a new execution. Nor can he set off the judgment, in an action brought against him by the debtor. Bac. Ab. (Todd's ed.) Execution, D; 2 Steph. N. P. 1217; Hob. (Wm's. ed.) 145, note; *Putnam* v. *Needham*, (2 Dane, Ab. 650); *Appleby* v. *Clark*, (10 Mass. 59); *King* v. *Goodwin*, (16 Ib. 63); *Taylor* v. *Waters*, (5 M. & S. 103.)

The statutes of this Commonwealth have altered the common law on this subject, in the following instances: namely, when the debtor is discharged on taking the poor debtor's oath; when the creditor discharges him, on bringing an action on the judgment, while the debtor is in prison or on the limits, and summoning a third person as his trustee; or when the creditor discharges him, on his demanding support in prison, as a pauper; or when the jailer discharges him because the creditor does not secure or advance full payment for his support in prison. (Rev. Sts. c. 98, §§ 14, 15, 16, 25; c. 97, §§ 50, 51, 59*e*. In these cases, the

statutes save to the creditor all his rights and remedies on the judgment, except that of arresting or imprisoning the debtor. And if the debtor shall be convicted of having wilfully sworn falsely on his examination before taking the poor debtor's oath, or in taking that oath, he may be again arrested and imprisoned. (Rev. Sts. c. 98, §§ 14, 15.) But the common law remains in force in all the cases in which the statutes have not altered it. And they have not altered it in the present case.

The plaintiff's counsel have treated this as a case of escape. But the breach of the condition of the bond given by the defendant for the liberty of the prison limits, was by an omission to surrender himself to be held in close confinement, and cannot be deemed an escape from prison. *Hathaway* v. *Crosby*, (5 Shepley, 453, 454.) The law entitled the defendant to the liberty of the prison limits, on his giving bond with a surety or sureties. That bond was approved by two justices of the peace and of the quorum, and must therefore, by the express provision of the statute, "be deemed sufficient." (Rev. Sts. c. 97, §§ 63, 65.) The fact that the surety in the bond was not answerable thereon, does not give the plaintiff any further remedy against the defendant, than if the plaintiff had voluntarily discharged him from prison, on his giving in sufficient security to pay the judgment. In that case, as we have seen, the plaintiff could neither sue the judgment, nor arrest the defendant again on a new execution. In that case and in this, the judgment is discharged, and the plaintiff's only remedy against the defendant was on the bond, by a suit brought within one year after the time of the breach. The sum recoverable for the breach could not have been less than the amount due on the original judgment, with interest thereon, and with all the lawful charges that had arisen after the issuing of the original execution. (Rev. Sts. c. 97, § 68.) The plaintiff, therefore, by being prevented from maintaining this action, loses nothing which he might not have obtained by a suit against the defendant, on the bond. Under the special provisions of the statutes of Maine, (St. 1835, c. 195, and Rev. Sts. c. 148,) an action of debt on the judgment might be maintained in a case like this. *Spencer* v. *Garland*, (2 Appleton, 75.)

Judgment for the defendant.

*Suffolk County, March Term*, 1852.

MASSACHUSETTS BANK v. SARAH H. OLIVER, EXECUTRIX.

*Promissory Note — Indorser; insufficient Notice to — Due Diligence.*

THIS was an action on a promissory note dated April 26, 1847, payable to the order of Henry J. Oliver, and indorsed by him, brought against said Oliver as indorser. On the 29th October, 1847, payment of the note was duly demanded of the promissor, and refused; and a notice was afterwards, by order of the plaintiff, put in the post-office in Boston on the same day, addressed to the estate of Henry J. Oliver, Esq., deceased, Roxbury, Mass. The notice, which was in the usual form, was done up by the notary in the form of a letter, and sealed. The note was presented on the 29th October, 1847, to the notary, by the messenger of the bank, for the purpose of making demand on the maker of the note, and giving notice to the indorsers thereon; and the notary, at the time the notice was handed to him by the messenger, inquired of him what parties were to be notified, and who was the representative of Henry J. Oliver, the deceased; and the messenger replied that he did not know; but the notary inquired of no other person who was such representative.

The following statement of Mr. Seaver, postmaster of Roxbury from 1845 to 1850, was taken as part of the case, if admissible as evidence. During Henry J. Oliver's life, letters addressed to him and to the members of his family were frequently received at the office, and delivered on being called for. After his decease, letters addressed to Mr. Oliver, and other members of the family of the deceased, and letters addressed either to the estate of Henry J. Oliver, or to the heirs of Henry J. Oliver, came to the office. All such letters were kept with letters addressed to other persons whose names began with N and O, and were delivered on being called for. The family had no box. A letter addressed to the estate of Henry J. Oliver would have been so kept, and handed to any person calling for letters for any Oliver except William M. Oliver. He could not state that all such letters were delivered; but persons were in the habit of calling for the Oliver letters, and he supposes that some of those persons were members of the Oliver family. Ladies dressed in black have so called, subsequent to the decease of Henry J. Oliver. He could

not state whether or not any of the letters above mentioned came to the office in October, 1847. He did not think the family came regularly to the post-office ; but they came as often as once or twice a week, and asked for the Oliver letters. He had known persons who had called for the Oliver letters, subsequent to Mr. Oliver's decease, to refuse letters after looking at the outside. He was not personally acquainted with Mrs. Oliver. He knew one of the sons of Mr. and Mrs. Oliver, but did not know his Christian name.

Any question or inference of facts which a jury would be justified to pass upon, was to be decided by the court upon the above statement.

Henry J. Oliver died Sept. 5, 1847, testate. The defendant was named as executrix in his will. And the executor therein named having refused to act, she presented her husband's will for probate on the 4th October, 1847. Notice thereof was published in the Boston Daily Advertiser, on the 5th, 12th, and 19th of October. She was appointed and duly qualified as executrix by the Judge of Probate for the county of Norfolk, on the 23d October, 1847, and gave notice of her appointment in the Advertiser, Oct. 26, Nov. 2 and 9, 1847. The defendant was then an inhabitant of Roxbury, as was Mr. Oliver at the time of his decease. The notices were published pursuant to the order of the Probate Court.

The President of the Massachusetts Bank, before the 23d of Oct. 1847, and after the death of Mr. Oliver, was informed by Edward Blake that the defendant was the executrix named in his will, but had no knowledge before the 29th day of October of her appointment as such executrix by the Judge of Probate. During the month of October, the Advertiser was taken by the plaintiffs, being taken from the office where it was printed, by the messenger of the bank.

The opinion of the court was delivered by

Metcalf, J. — When the indorser of a note dies before its maturity, it is necessary, in order to charge his estate, that notice of non-payment should be given to his executor or administrator, if there be any known to the holder, or who might be known to him on his using due diligence to ascertain. *Oriental Bank* v. *Blake*, (22 Pick. 206) ; *Merchants Bank* v. *Birch*, (17 Johns. 25) ; *Cayuga County Bank* v. *Bennett*, (5 Hill, 236.) And when the holder

and the executor or administrator live in different towns, a notice properly directed to the latter and put into the post-office, is sufficient. *Shed* v. *Brett*, (1 Pick. 401.) The notice in this case was directed to the "Estate of Henry J. Oliver, deceased," and was put into the post-office at Boston. It is insisted for the plaintiffs that this was sufficient, and their counsel have cited a decision of the Supreme Court of Tennessee, *Pillow* v. *Hardeman*, (3 Humph. 538,) that notice directed "to the legal representative" of a deceased indorser, is a good notice. The ground of this decision was that the words "legal representative," in their ordinary sense, are synonymous with executor or administrator. *A fortiori*, notice directed "to the executor or administrator," without naming him, would have been held sufficient. But either of such notices would be directed to an existing person, though not by name, yet by clear description, and that person would know that it was addressed to him, as well as he would know it if his name were used. In the present case, the note was not directed to any person, either by name or description, but "to the estate" of the defendant's testator. This direction was quite as applicable to the testator's heirs at law as to his executrix, and there is no reason why she, rather than they, should take it from the post-office, or be presumed to have received it. Whether this notice would be held sufficient if it had appeared that the defendant received it, we need not inquire; for the statement of the postmaster at Roxbury does not warrant us to infer with any confidence that she did receive it, and thereupon to charge her with actual notice. But as the law does not require that the holder of an indorsed note should have knowledge beyond his means of obtaining it, he is excused from giving notice to the executor or administrator of the indorser, when he neither knows, nor can by reasonable diligence know whether there is one, or who he is, or where he resides. The use of due diligence to ascertain, is all that is required. Was such diligence used in this case? We are all of opinion that it was not. The indorser died more than seven weeks before the note was payable. The President of the bank had information a week at least before the note was payable, that the defendant was the executor named in the indorser's will. The plaintiffs took the newspaper in which the defendant had given notice, three days before the note fell due, that she had been appointed executrix of the will,

and had taken upon herself that trust. And though it is agreed by the parties that the President of the bank had no knowledge before the day when the note was payable, of the defendant's appointment as executrix, by the Judge of Probate, and though we were to assume (without proof) that no other of the officers of the bank, before that day, saw the defendant's notice in the newspapers, nor actually knew who the executor was, yet the facts which the parties have agreed on show that certain knowledge might have been obtained in a very few minutes, if any proper inquiry had been made by any of those officers, or by the notary into whose hands the note was put for protest and notice.

Judgment for the defendant.

*William Sohier*, for the plaintiffs; *W. R. P. Washburn*, for the defendant.

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### Decisions under the New Practice Act.

*Supreme Judicial Court, Middlesex, January*, 1853.
*Nisi sittings at Boston.*

JOHN C. PALMER *v.* EZEKIEL WHITE.

The assignee of a chose in action upon which suit is brought, is a competent witness for the plaintiff under the Massachusetts statute of 1851, ch. 233, § 97, and 1852, ch. 312, § 60.

THIS was an action of assumpsit, to recover a bill for advertising by the defendant in the plaintiff's newspaper.

On the back of the writ is the following indorsement — "This claim is assigned to Walter M. Mason, indorser."

Said Mason, who was admitted to be the assignee of the claim and indorser of the writ, was called and offered as a witness by the plaintiff. The defendant objected to his competency, but the Court of Common Pleas, before whom the action was tried, overruled the objection, and admitted said Mason to testify. To this ruling the defendant excepted.

*Dean & Dinsmore*, for plaintiffs.

*Brown & Alger*, for defendants.

The opinion of the court was drawn up by

BIGELOW, J. — We have no doubt that under Stat. 1851, ch. 233, § 97, (re-enacted in Stat. 1852, ch. 312, § 60,) the assignee of the chose in action in the present suit was a competent witness.

The language of the section is as follows: — "No person offered as a witness shall be excluded from giving evidence,

either in person or by deposition, in any proceeding, civil or criminal, in any court or before any person having authority to receive evidence, by reason of incapacity, from crime or interest; but every person so offered shall be admitted to give evidence, notwithstanding, he may have an interest in the matter in question, or may have been previously convicted of any offence; but this act shall not render competent any party to a suit or proceeding who is not now by law rendered competent, nor the husband or wife of any such party. But nothing herein contained shall be deemed applicable to the attesting witnesses to any will or codicil; and the conviction of any crime may be shown to affect the credibility of any person testifying."

It was clearly the intention of the Legislature to abolish entirely, by the above section, the disqualification of witnesses not parties to the record, arising from interest in the subject-matter in question. Under this statute the extent of interest, whether slight and contingent, or absolute and covering the whole amount in controversy, is wholly immaterial as affecting the competency of a witness, and goes solely to his credibility. The only limitation upon the admissibility of witnesses contemplated by the act, is the exclusion of parties to the record; that is, persons who are either plaintiffs or defendants. This furnishes a clear, distinct and practical rule, founded upon considerations of justice and sound policy, while an attempt to distinguish between different degrees of interest would only lead to collateral issues, and confusion in the trial of causes.

Such we think was the view of the learned commissioners who drafted the Practice Act. It is stated by them in their report to the Legislature, that the above provision in relation to the competency of witnesses is borrowed from the Act of 6 & 7 Vict., ch. 85, § 1, commonly called Lord Denman's act. (Hall's Mass. Pract. 194.) On recurring to that act, it will be found that there is an express exception in it, by which no person is rendered competent "in whose immediate and individual behalf any action may be brought or defended, either in whole or in part." This exception would render incompetent as a witness, an assignee of a chose in action prosecuting a suit for his own benefit, as in the present suit. *Hall* v. *Kitching*, (3 Man. Gr. & Scott, 299.) But its omission in our statute is significant, as showing that it was intended to be more comprehensive

than the English statute, and was not designed to embrace cases of this kind. The decisions of the English courts upon the construction of Lord Denman's act, show that no amount of interest, however great, in the event of a suit, will exclude a witness, unless he is within the express exceptions enumerated in the statute. Thus it has been held, that a husband is a competent witness for the plaintiff in a suit brought by the administrator of his wife upon a note given to her *dum sola*, although the proceeds of the note when collected would be payable to him by her administrator: the suit not being brought "in his immediate and individual behalf." *Hart* v. *Stephens*, (6 Adol. & Ellis, N. S. 937.) See also *Sinclair* v. *Sinclair*, (13 Mees. & Wels. 640); *Sage* v. *Robinson*, (3 Wels. H. & Gr. 142.)

Exception overruled.

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*Court of Common Pleas, Suffolk, ss., Oct. Term*, 1852.

BRIGHAM ET AL. Assignees of George Lambert, v. PETERS.

THIS was an action of trover for a promissory note, alleged by the plaintiffs to have been made payable to said Lambert, and to have passed out of his control by a forged indorsement. The defendant undertook to show that the indorsement under which he claimed the note was either genuine or was authorized by said Lambert.

In order to prove this, the defendant filed interrogatories under the Practice Act of 1852, to be answered by the plaintiffs, and called for the books and papers of said Lambert, in the hands of the plaintiffs, his assignees. These papers were drawn out by the defendant's interrogatories, and were lodged in the clerk's office for the use of the defendant.

Before the trial the defendant gave notice to the plaintiffs to produce at the trial all books and papers of the insolvent that had come to their hands.

At the trial, and in order to establish their title to the note sued for, the plaintiffs put the insolvent, said Lambert, upon the stand as a witness. Before cross-examining him, and to enable defendant to cross-examine, he called for the books and papers referred to in his notice to produce. The plaintiffs claimed that they ought not to be affected by that notice, because the defendant had already obtained the

books and papers, accompanied by their answers to the interrogatories, and might use the papers in connection with said answers. If the defendant wished to put in part of what he had drawn out by his interrogatories, he could do so only by introducing the whole; and the defendant should at this stage decide either to use the whole answers or no part of them. The defendant thereupon openly relinquished all claim under his interrogatories to the books and papers called for under his notice to produce. The plaintiffs then claimed that the papers were in the custody of the court, being in the clerk's office. The court (Perkins, J.) discharged the papers from its control so far as it had any, and left them in the plaintiff's hands, and also decided that the defendant was not bound at this stage of the case to say whether he would put in the plaintiff's answers to his interrogatories or not; that the defendant having disclaimed any intent to use the papers as a part of such answers — having returned them to plaintiffs, and they being at the time in the plaintiffs' hands—the plaintiffs were bound to produce them on the seasonable notice given, or the defendant might prove their contents by secondary evidence; and thereupon the plaintiffs produced the papers. The court also held that the use of the papers under this production on notice, would not bind the defendant to put in the answers of the plaintiffs on which the papers were originally produced and deposited in the clerk's office.

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FIFTY ASSOCIATES *v.* TUDOR.

THIS was an action of tort. The writ alleged, that the defendant entered upon the plaintiffs' land, and tore down the plaintiffs' wall. The answer of the defendant admitted the fact, and claimed as a justification that the wall prevented the admission of light and air to a certain building belonging to the defendant, in violation of the defendant's right to the admission of the same; and that the defendant threw down the said wall for the maintenance of said right.

The plaintiffs filed interrogatories to the defendant under the Practice Act, and by one of the interrogatories called for an answer to the following, viz:

"Did you ever have any agreement, written or otherwise, or any deed or writing from the plaintiffs, granting you the right to overlook by windows in your said building the lot

of said land situate on the easterly side thereof, and belonging to the plaintiffs, or to have any right of light and air over or upon said lot? If you say you ever had any such deed or writing, please annex it, or a copy of it, to your answer; if you say that you ever had any verbal agreement or permission with or from the plaintiffs, to overlook, by the windows in your said building, the said lot of the plaintiffs, then state particularly what such agreement or permission was, and the terms thereof, and state the name or names of the particular officer or officers of the plaintiffs' corporation with whom it was made. Did the plaintiffs ever make any, and, if any, what covenant or agreement with you, not to obstruct the windows or lights of your said building?"

The defendant answers as follows, viz: — "That as said interrogatories seek for discovery of the manner in which his case is to be established, and of evidence which relates exclusively to his own title and cause, and of the names of the witnesses by which the same is to be proved and established, and as he is advised that the plaintiffs have no right to such discovery, he declines to answer the same, unless the Court shall so order."

The plaintiffs now move that the defendant may be required to answer fully to the above interrogatory.

Perkins, J., ruled that the defendant was not bound to make the disclosure sought. Sect. 61 of the Practice Act of 1852, under which these interrogatories have been filed, provides that the plaintiff and the defendant may file interrogatories for the discovery of facts and documents, material to the support or defence of the suit. Sect. 69 of the same act provides, among other things, "that the party interrogated shall not be obliged to disclose the names of the witnesses by whom, or the manner in which he proposes to prove his own case."

Under these provisions the plaintiff has a right to a disclosure from the defendant of all the facts and documents which are material to the support of his case, and the defendant has also the same right as to the defence. But the plaintiff cannot compel the defendant to discover the circumstances of the defence he sets up — the documents or the parol evidence by which he intends to support it — or whether he will undertake to support it by the one or the other. The rule of proceeding in reference to disclosures by the plaintiff and defendant under the Practice Act, so far as this point goes, is in principle precisely like those

adopted in processes for discovery in chancery practice, which are clearly and satisfactorily settled. It is evident then the defendant is protected from answering the questions proposed in this case.

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## Abstracts of Recent American Decisions.

*Suffolk, March Term,* 1852.

*Action — Contract — Corporation.* Assumpsit on an alleged written promise, in a subscription paper, to take and pay for five shares in the stock of the plaintiff's corporation not then organized. By the subscription paper, the stock was to be $1,500,000, but it was fixed at $1,350,000; and it was *held*, that the alleged promise, being in effect on condition that the stock should be $1,500,000, the action could not be maintained, and that taking the shares, attending meetings, and paying an assessment would not operate as a waiver of the condition, so as to render the defendant liable on the alleged express promise to pay for the shares, whatever his liabilities as a stockholder might be. — *Atlantic Cotton Mills* v. *Abbott.*

*Contract.* Assumpsit for not fulfilling a parol contract to carry the plaintiff to California on certain terms. Defence, that the defendant had subsequently, and before the sailing of the vessel, declined to perform the original contract without a certain modification to which the plaintiff assented, and that the contract, as modified, had not been complied with by the plaintiff. *Held*, that the modified agreement if proved, formed the basis of the future obligations of the parties as to the subject of the contract, although made without further consideration than the facts stated imply. — *Holmes* v *Doane.*

*Deed — Evidence — Mortgage — Writ of entry.* Demandant and tenant both claimed under the same grantor, the former by the elder deed. In that deed the premises were described as beginning at the lower corner of C. and D.'s wharf, and running "in a direction of about S. 60° E.; bounded northerly on said C. and D.'s *wharf and flats* to the channel or low-water mark," and the southerly line was made parallel to the northerly line on other lands of the grantor. By running the northerly line throughout in the above direction, and as it had been long recognised on plans and deeds of the grantor's estate, the parallel southerly line did not include the demanded premises, but by changing its direction at the extremity of the wharf, to conform to the line of the flats, it did include them. *Held*, that the flats were equivalent to a monument, and must determine the line although requiring a change of the direction, and that a general misapprehension of the true line would not prevent its establishment. The tenant offered in evidence, to defeat the action by proving a paramount title in himself, sundry mortgages on the premises by the demandant assigned to him pending the action, and it was *held* that he could not so avail himself of them. — *Curtis* v. *Francis.*

*Evidence — Verdict — Trover.* Trover for certain property seized on execution against a third party. Among the articles taken was a cow which the defendant was afterwards satisfied belonged to the plaintiff, who purchased it among other stock at the sale, and the defendant delivered it to him but refused to receive payment, and gave a receipt for the rest, acknowledging tender of the price of the cow. The jury were instructed that these facts were not a discharge of the plaintiff's liability for the cow, and that the measure of damages on a verdict for him as to it was the price bid. *Held*, that these facts were a discharge and acquittance, and the

plaintiff was allowed to take judgment for the balance, there being a verdict in his favor on remitting the price of the cow. *Held*, also, that a witness offered to impeach another, might be asked on cross-examination whether he had not had a quarrel with that other; that evidence of fraudulent conveyances of other property was inadmissible to show that that sued for had been fraudulently conveyed; also declarations of the party in possession that it belonged to him, the claimant not deriving title from such party, and the declaration not being made with his knowledge or in his presence. — *Long* v. *Lamkin*.

*Insurance — Contract — Evidence.* Assumpsit for assessments on a mutual insurance deposit note. *Held*, that the defendant was liable for assessments, although he had no insurable interest in the property while his policy was outstanding; that it was no objection to the assessments that they were not made for each loss, but at reasonable intervals on all notes then on hand; and that the production of the note on trial was *primâ facie* evidence of the issue of the policy, so that the policy itself or secondary evidence need not be produced. — *N. E. Mut. Fire Ins. Co.* v. *Belknap*.

*Pleading — Tender — Trover — Action.* Trover for clam bait brought by a schooner to Boston from Halifax, consigned to the plaintiff, and put in charge of the defendants for the owners of the schooner, with instructions not to deliver it until the freight and the sum due for carrying a passenger was paid, it being alleged that it was agreed at H. that his passage should be paid from the proceeds of the clam bait. The plaintiff contended he had tendered all but this passage-money, admitted that a tender was necessary, and at the trial below instructions were given on the subject of tender. But it was *held*, that where goods were to be delivered on paying freight, an action lay for the non-delivery without a tender; for where concurrent acts were to be performed, as to pay on the one hand, and deliver on the other, the party complaining of non-performance need only aver that he was himself *ready* to perform; that trover need not have been brought; but that if there was a refusal to deliver, except on a condition which the party had no right to impose, it was a conversion. — *Adams* v. *Clarke*.

*Promissory Note — Partnership.* Assumpsit against the maker of a negotiable promissory note, indorsed in blank. A. and B. being partners sold out to C., and divided between themselves four of six promissory notes given by him in payment, each taking two as his share and property. One of the notes which was received by A. as his, he indorsed in blank with the firm name. B. afterwards went into insolvency, and A. subsequently sold the note so indorsed. *Held*, that while partners they might lawfully divide their joint property between themselves, and so long as their copartnership continued, each might act in the name of the firm to vest a title to his share in himself alone; that the indorsement before a dissolution did vest in A. a perfect title to the note, which he could transfer, so that a good title was vested in the plaintiff. — *Mechanics Bank* v. *Hildreth*.

*Replevin — Mortgage — Shipping — Deed — Evidence — Lex Loci Contractus.* Replevin for a vessel mortgaged in Nova Scotia, where the mortgagor and mortgagee both resided, and attached in Boston on a writ against the mortgagor when in his possession, it never having been actually delivered to the mortgagee. The mortgagee gave notice and made a demand, as provided by Rev. Stat. c. 90, but his debt was not paid. The mortgage was in the form of an indenture, but executed only by the mortgagor. The certificate of registry, and the recording and indorsement of the mortgage, were certified to by one E. F. S., purporting to be for the comptroller of the port. It was not recorded in Boston. The English statutes provide that acts to be done by the collector or comptroller shall be valid, if done by him or other principal officer of the customs. The plain-

tiff offered evidence that the collector of the port was then absent, and that E. F S. was chief clerk of the customs and then acting as the principal officer of the customs, and the testimony of E. F. S. that he was authorized by the statutes, and practice under them, to do the acts in question. *Held*, that the mortgage was good; and that the evidence of the authority of E. F. S. was sufficient; and that replevin would lie to recover possession. — *Esson* v. *Tarbell*.

## Miscellaneous Intelligence.

The Broadway Railroad. *Process against the New York Aldermen for Contempt of Court* — The proceedings in this matter, which have excited so much interest and remark, have at length reached, so far as the process for contempt is concerned, a point wherein a definite account of the case can be given. On the 19th of November last, the Board of Aldermen of New York adopted certain resolutions, and on the 6th December, the assistant aldermen passed the same, granting to Jacob Sharpe and others, the right "to lay a double track for a railway in Broadway, &c. &c., thereafter to continue the same from time to time to Manhattanville." The resolutions were duly sent to the Mayor for approval, but on the 18th December they were returned to the Board of Aldermen, without his approval, and with the reasons for his veto. Attempts were immediately made, by the aldermen and assistants, to pass the resolutions notwithstanding the veto of the Mayor. Certain persons, the plaintiffs in the legal proceedings, "as well on their own behalf as on behalf of all other corporators and tax-payers of the city of New York," who might be affected by the several matters stated in the complaint, applied on the 27th December to the Superior Court of the City of New York for an injunction to prevent the aldermen and assistants from passing the resolutions. The complaint set forth, that the complainants were residents of the city, that they severally owned real estate upon Broadway, that they severally paid taxes, assessed to defray the annual expenses of the city, exceeding $250 per annum; that the taxation in New York had increased to an alarming extent, being in 1846, $1,654,323; in 1852, $2,561,650, and that the estimates for 1853, required $3,972,650; that all the powers of the corporation of the city are held upon the trust that they shall be exercised for the benefit of the citizens, "without any fraud, corruption, evil practice, or deceit;" that this corporation is a body politic and corporate, capable of suing and being sued, in any court of record, in all manner of actions.

The complaint then recites the provisions of the resolutions granting the privilege to Sharpe and others. The resolutions require of the grantees of the privilege, that the associates shall pay for ten years from the opening of the railway an annual license fee of $20 per car, "and shall have a license accordingly," and after that period such license fee as the corporation with the permission of the legislature shall then prescribe; that five cents fare for each passenger is the highest fare that the grantees shall be allowed to charge; and that the grantees shall cause the street to be well swept and cleaned every morning except Sundays, before 8 o'clock, A. M. in summer, and 9, A. M. in winter, below Fourteenth street, and above that as often as twice a week, when the weather will permit." Permission was also given to the grantees at any time to incorporate themselves under the general railroad act whenever two thirds in interest shall require it. The rights given were to vest in the grantees, upon their filing with the

Clerk of the Common Council, a writing signifying their acceptance thereof, and agreeing to conform thereto.

The complaint further set forth, that before the said resolutions were passed by either branch of the city government, men of standing, character and wealth, residents of the city, and abundantly able to perform their contracts, applied to the Common Council for the privilege and authority to construct the road, and offered, in addition to all the terms imposed by the resolutions on Sharpe and his associates, to convey passengers at a less charge than five cents each, and to pay a large bonus into the treasury of the city; that one of the propositions was to pay a bonus of $1,000,000, and charge only three cents fare; another was to pay $1,000 per car, and three cents fare; another, to pay $1,666 per car, and five cents fare.

The complaint further set forth the veto of the Mayor, and the grounds thereof, and that, notwithstanding the veto, the aldermen and assistants were continuing their sessions, with a view to carry their declared purpose into effect, and that the grantees avowed their intention to accept the grant in writing as soon as made, and to proceed at once to construct the track. It was also alleged, that the city authorities had no right to construct a railroad in the street, or to authorize others to do so; but that, if they had power to grant the use of the street for such a purpose, it would be a palpable fraud upon the whole community to grant it to one company, with the power to charge five cents fare, when another would construct and keep it in operation and charge only three cents fare; or to give the grant to a company charging therefor a license fee of only $20 a car, and five cents fare, while others offered for the privilege, $1,000 per car, and were to charge only three cents fare.

The complaint was verified in due form, and the Judge to whom application was made issued the injunction order, which commanded "the Mayor and Aldermen and Common Council of the City of New York, their counsellors, attorneys, solicitors and agents, and all others acting in aid or assistance of them, and each and every of them," to "absolutely desist from granting to, or in any manner authorizing Jacob Sharpe and others, or their associates, or any other persons whomsoever, the right, liberty or privilege, of laying a double or any other track for a railroad in the street known as Broadway in said city of New York."

This injunction was duly served upon the parties named in the order, but was not obeyed. The grant was made notwithstanding the veto of the Mayor and the injunction of the court, and the grantees at once filed their acceptance thereof in writing. A resolution was also introduced by Alderman Sturtevant, reflecting severely upon the conduct and motives of the Judge who granted the injunction. The counsel for the complainants at once obtained an injunction against Sharpe and his associates to prevent them from constructing the road, and moved that attachments issue against the defiant members of the board for a contempt of court in disobeying the injunction order. Instead of issuing an attachment, a rule was in the first place granted, requiring Alderman Sturtevant (his case being selected as a representative case) to show cause why an attachment for contempt should not issue; and at the return day a full discussion was had upon the jurisdiction and authority of the court. These, after full arguments, were sustained. It was decided that the court had full authority to restrain by injunction a municipal corporation, "as well from infringing the public franchise, in a case presenting an unquestionable abuse of power to the prejudice of individuals and the whole body politic, as from granting mere property to a particular association of individuals, where others stand ready and offer to pay double the price for the same property. In appropriating the funds of the people, municipal corporations are creatures of limited

powers; and when they attempt to appropriate the public funds to purposes not authorized by the charter or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their act is without authority, and void."

"The only serious question is, whether the suit should have been instituted in the name of some one representing the whole people, or whether it may be brought in the name of an individual. That a suit may be instituted in the name of an individual to restrain a public nuisance when it occasions special injury to the plaintiff beyond that which the community suffers in common with him, is expressly affirmed in many cases." But this question was treated as of little importance in the matter of contempt, as the fact that a suit was wrongly brought, would not justify a party in disobeying an order of the court therein. An order for attachment was granted against the alderman, returnable at a future day; and he was held to bail in $500. The other defiant aldermen were ordered to show cause why an attachment for contempt should not issue against them. The order was treated lightly at first, the aldermen supposing themselves beyond and out of the power of any court. The resolute bearing of the Judges soon opened their eyes to their error, and on the 21st February, they, or most of them, appeared before Judge Duer. The newspapers state that they were a motley-looking group, and conducted themselves variously; some seemed to be penitent, but the majority maintained the true aldermanic bearing, "Pride in their port, defiance in their eye." One alderman filed affidavits to the effect that he was not aware that he was disobeying any law in voting for the grant in disobedience of the injunction. This excuse was not deemed sufficient by the Judge, and as he had no other to offer, an order for attachment was issued against him, returnable three days afterwards. He was held to bail in $500. Another made a verbal excuse, in which he stated that he voted for the railroad because he thought he had a right to, and was not aware of any law to prevent him. The Judge asked if that was all he had to say, and being informed that it was, he told the plaintiff's attorney he might take an order for attachment against him — and so with the others: "they all with one accord began to make excuse;" but the excuses were held invalid, and orders for attachment issued.

The next question arose upon the punishment to be imposed upon the offenders. The statutes gives power to the Judges to fine, not exceeding $250, or imprison, not exceeding thirty days, or both, according to the nature of the offence. The courts in New York have also the power to condemn the parties in costs, and to allow counsel fees in their discretion. To ascertain what would be proper in these cases, it was agreed that it should be referred to William Kent, Esq. We give his report in full: —

"The undersigned, a referee appointed by an order of the court, on the 5th of March inst., to report what are the costs and expenses of the relators, Davis and Palmer, including the expenses of the reference and reasonable counsel fees, respectfully reports that the attorneys and counsel of the relators have appeared before him, and the counsel for the defendants, and that he has taken testimony in relation to the matters referred, and heard the argument of counsel thereon; that in making this report he has taken into consideration the pending of twenty-six other cases, in which motions of attachment have been made, and subsequent proceedings have been had similar to the motions and proceedings in this case; the questions of law being essentially the same in all, and the arguments on which those questions were decided having been made in this case.

"The referee has, therefore, proceeded on the principle of ascertaining the aggregate amount of costs, and expenses, and counsel fees in all the cases,

and of assigning to each case an equal and proportionate share of the aggregate amount.

"The referee finds that the relators have incurred the following expenses, which should be reimbursed to them, viz.:

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|---|---|
| Sheriff's fees in the 27 cases being, . . . . . | $18.63 |
| Printing expenses, for printing the various documents required for the use of the court, and in the course of the legal proceedings. . . . . | 132.15 |
| He further finds that the costs of the plaintiff, legally taxable in the twenty-seven cases, amount to five hundred and forty dollars, being twenty dollars in each suit, . . . . . | 540.00 |

"In inquiring as to the amount of reasonable counsel fees to be reported to the court, in pursuance of the order, the referee has experienced a difficulty in passing upon services to which no precise standard of value can be applied, and which can be only imperfectly exhibited to him by testimony. The sum which is reported below is much less than was claimed on behalf of the relators for their counsel, and less, it was testified, than the relators were prepared to pay.

"In discharging, to the best of his discretion, the duty of fixing the amount of the counsel fees, the referee states that he has not adopted the counsel fees, which, as between counsel and client, would probably be freely paid; but that while considering the important character of the proceedings before the court, and the elaborate argument of the counsel, he has endeavored to ascertain the amount of such counsel fees, as it would be reasonable to report in an adversary proceeding between plaintiff and defendant.

"The number of the counsel employed by the relators was proved before him; and it was concluded that the labor and occupation of time had not been equally borne by the gentlemen who acted as counsel. The referee does not feel himself called upon by the order to enter further on this subject, nor to make any distinction in the fees of the counsel.

"He reports, as in his opinion, reasonable counsel fees in the twenty-seven cases, the aggregate sum of two thousand dollars.

"The referee further reports the expense of the reference in the twenty-seven cases to be fifty dollars.

"He further reports that the sum of sixty-nine cents is an additional sheriff's fee against the defendant, Oscar W. Sturtevant.

"The items above mentioned, of costs, expenses, and counsel fees, computed together, form the sum of two thousand seven hundred and forty dollars and seventy-eight cents, which, divided equally among the twenty-seven cases, makes the sum one hundred and one dollars and fifty-one cents applicable to each case.

"To the last mentioned sum must be added, in the present case, the sheriff's fee of sixty-nine cents.

"The referee, therefore, reports as the costs and expenses in this matter, including the expenses of this reference and reasonable counsel fees, the sum of one hundred and two dollars and twenty cents.

"All of which is respectfully submitted. WILLIAM KENT, *Referee.*"

After this report of the referee was made, sentence was passed upon the defendants. The extreme fine of $250, in addition to the $101.51 costs of the relators, was imposed upon all who voted for the resolutions. In some cases there were mitigating circumstances, which were regarded by the court, and the fine was diminished; but the costs of the relators were charged upon each and all. Alderman Sturtevant, who enjoyed the bad pre-eminence of being the concoctor of the resolutions, and the chief instigator of the contempt, alone was imprisoned. His imprisonment was for fifteen days. He was indebted for this undesirable distinction in part

to the fact that he is a lawyer, and should have known better. One of the Judges (Emmett) dissented as to the sentence, thinking that alderman Sturtevant should have been imprisoned thirty days, and that the other aldermen should have been imprisoned for different terms. The court decided also that an appeal could be taken from their decision, which was given at a special term of the Supreme Court, to the general term. When the case came before the general term, the Judges without argument ordered an entry to be made on the docket confirming the decision of the special term. From this order an appeal was taken to the Court of Appeals, where the question will be finally disposed of.

We have been much pleased with the calmness, dignity and moderation with which the court met and discharged this important duty. It was a crisis when it must be settled whether the court had authority to enforce its decrees, or whether its orders could be defied with impunity. Every body is satisfied with and commends the result.

We have stated that resolutions were passed by the aldermen reflecting upon the Judge who granted the injunction, in preparing which resolution one of the Judges said that the author "Had taxed the powers of the English language for words sufficiently expressive to make it as offensive as possible." Judge Duer, in the conclusion of his opinion given when granting an order for attachment against Alderman Sturtevant, thus quietly disposes of these intended insults.

"It may be thought a singular omission in the opinion I have delivered, that I have forborne from those comments upon the proceedings of the Board of Aldermen, and upon the resolution moved by Mr. Alderman Sturtevant. and especially the injustice and violence of the attack which they contain upon the conduct and motives of Mr. Justice Campbell, which they would seem not merely to justify, but demand.

"Perhaps, hereafter, the necessity of making such remarks may be imposed upon us; but at present I shall content myself with adopting, with some slight changes, as strikingly applicable, the language of a late colleague, a judge alike distinguished by the moderation of his temper, the purity of his character, and the soundness of his judgment. In the case of *Capet* v. *Parker*, (3 San., p. 662,) in which a defendant had disobeyed an injunction under the advice of his counsel that it was illegal, Mr. Justice Mason said:

"'We live under a government of law, and it is one of the peculiar felicities of our condition that the moral sense of the community is so strongly on the side of obedience to law, that in the civil administration of justice, a resort to force or punishment is seldom necessary to carry the judgments of the courts into effect. They are submitted to as a matter of course. It is peculiarly the duty of those who profess the law, and emphatically, I add, of those who thrive in its administration or execution, to cherish this feeling, and to elevate and strengthen the spirit of obedience to judicial authority; and it is a matter of deep regret, when any of those whose province it is to aid in the administration of justice, by their own example, encourage a resistance to or disregard of the decisions or orders of the court, or of any of its judges.'"

THE MADIAI AND THE ADMINISTRATION OF CRIMINAL LAW IN TUSCANY. —The London Law Review for February has an article upon Tuscan jurisprudence and its administration, furnished from Florence by an English lawyer temporarily residing in that city, from which we gather with more exactness than we have been able to from other sources, the proceedings against the Madiai, whose condition has excited so powerfully the sympathy and interposition of the Protestant world.

The ordinary course of criminal proceedings is as follow: — "The police having exercised their powers of arrest, (search of the person of the prisoner and of his house, and perhaps of other houses, for books and papers,) and having interrogated the prisoner, the next step is to ascertain under what category the act imputed to him falls; *i. e.*, Is it a matter to be disposed of by the police? or is it *leggiera offesa?* or, thirdly, is it a *delitto?* All offences are *delitti* which infer a penalty greater than exile from the local jurisdiction of the minor courts competent to try the 'lighter offences.' When, as in the case of the Madiai, the act is presented as a *delitto*, the documents, including the depositions, are laid before a Court of Accusation composed of three judges, who like all in Tuscany are removable, and who decide by a simple majority of votes. All prisoners are defended by counsel; and if the prisoner does not choose one for himself, an advocate is assigned to him by the court. The court has no power to remunerate the assigned advocate; but the law gives to every advocate, whether assigned by the court or chosen by the prisoner, a right of action against the client for his fees, — a right very little exercised.

"Before the Court of Accusation the prisoner may be again examined, and the crown advocate, the *Procuratore Regio Generale*, has a right to be heard. The court, too, has the power of ordering the attendance of fresh witnesses, and of taking all such steps as are necessary to prevent a failure of justice. By the law of 1838, the counsel for the prisoner has no right to interpose in this stage of the proceedings; indeed his interposition is prohibited in express terms, yet in practice he does appear, and did so in the case of the Madiai; and the privilege, if refused, would probably now be claimed as a right — a very short usage being, according to the principles of Tuscan jurisprudence, sufficient to operate by way of repeal of the written law of the state. If by the decision of the court the case is ordered for trial, the prisoner has the right of *ricorso* to the Court of Cassation, if he should be advised that a miscarriage has occurred in the conduct of the case; as, for instance, if a decision which finds a 'true bill' against him, as we should say, has been arrived at by a smaller number of votes than the law requires; or again, if he should be advised that the acts charged against him do not amount to a *delitto* or crime. It is, for various reasons, not always thought prudent to exercise this right. If the decision of the Court of Cassation sustains the *ricorso*, the case is sent back to be dealt with according to the decision of the Supreme Court, to be amended, if the defect admits of amendment, and if not, to be abandoned. On the other hand, should there be no *ricorso*, or should it fail, the case goes at once before the *Corte Regia* for trial, and it immediately becomes the duty of the *Procuratore Generale* to prepare an *atto di accusa*, an instrument answering to our bill of indictment, the object of which is to inform the prisoner of the offence charged against him, and citing the law which applies thereto. This instrument being filed and a copy given to the prisoner, his counsel is permitted to have a free inspection of the proofs against his client, and if he intend to call witnesses, he must give notice of their names and what they are expected to prove. This being done, the President of the court permits such of the witnesses to be summoned as appear to him from the note of their expected evidence it would be useful to the ends of justice to call; and they are brought at the public expense, the prisoner always having the right to produce, at his own expense, any evidence he may judge material to his interests. If the prisoner is not arrested, which is sometimes the case, until after the *atto di accusa* has been lodged, the prisoner is interrogated by the President of the court, before which he is to be tried, but only to identify the prisoner with the person accused, and to receive from him such declarations as he may please to make.

"The evidence for the prisoner as well as for the government is given in the first instance, in the form of a deposition. When the investigation by depositions is complete, the case is ripe for public trial, and the depositions are *functæ officio*. The witnesses are examined at the trial and cross-examined by the President, who uses the deposition by way of brief, the counsel on either side only interposing with suggestions for his adoption. There are several provisions of the law, for the benefit of the prisoner; among which is the one permitting the advocate for the defence to have the close. Two objects are steadily kept in view throughout this system of procedure: first, that justice shall not be defeated, either on the one side or the other, by surprise or miscarriage; and, secondly, that an innocent prisoner shall have every possible facility for proving his innocence. The decree of accusation and the final sentence are both *motivati;* that is, the reasons are given, and in the latter, the facts, as found by the court, are set forth. The case may be carried from the *Corte Regia*, on points of law, to the Court of Cassation, the highest court, to be again followed by a *decreto motivato*.

"The Madiai, Francesco and Rosa, were sent to trial, accused of impiety in having beeen engaged in the work of propaganda and of proselytism, not only by teaching, but by the diffusion of books and printed tracts, to the injury and disgrace of the Catholic religion dominant in the Grand Duchy. The charge was, then, one of proselytism, by certain indicated means, which might be public or might be private. The *Procuratore Generale* cited the 60th article of the Leopoldine code as the law applicable to the case, which is as follows: — 'Whoever, with an impious object, shall dare to profane the Divine mysteries by disturbing the sacred rights with violence, or shall otherwise commit public acts of impiety, and whoever shall publicly teach maxims contrary to our Holy Catholic religion, for which we have always nourished, and perpetually shall nourish, our constant love and zeal, we will that, as a disturber of that order by which society is governed and maintained in tranquillity, and as an enemy of society itself, he shall be punished with the greatest and most exemplary rigor, and never with a less penalty than labor in public (*pubblici lavori*) for a time, or for life, according to the circumstances of the case.' By subsequent laws, labor in public was commuted for labor in prisons. Their trial upon this charge followed the usual course of trials, and they were aided in their defence by an able advocate. The *sentenza* of the *Corte Regia*, sets forth that the fact of proselytism was proved against them as regards one young woman in their service, and the decree of that court, finding that 'in this fact are the ingredients required by article 60, so as to sustain the application of its penal sanctions,' sent back the Madiai to separate prisons — the husband for fifty-six months, the wife for forty-five months — from November, 1851.

"A *ricorso* was taken to the Court of Cassation, on the grounds that the facts proved did not amount to a crime within the meaning of the law; and, secondly, that, admitting the offence to have been committed by reason of any *quasi* publicity, it was not punishable except by exile, or imprisonment exclusive of hard labor. This second objection was deemed as important, practically, as the first, for, if the act should be considered a minor offence, the prisoners would have been entitled to their freedom from the length of time (twelve months) during which they had been in confinement. The Court of Cassation confirmed the sentence of the court below. It is stated that the *Procuratore Generale* himself was so convinced by the argument of the advocate for the defence, on the second point, that he not only abandoned his own, but made a powerful address to the Court in support of that portion of the defence. The court, however, was differently constituted.

"Every fact which has been brought to light in this unhappy controversy has disclosed some trait honorable to the accused; so that, if it had been the object of those who instigated the proceedings to make an odious principle still more odious by the circumstances of its application, never was an object more completely attained. The *Procuratore Generale* himself bore ample testimony to the virtues of the Madiai, when he expressed his regret, that persons of so much natural probity and beneficence should be lost to the Catholic faith.

"The truth is, and it is a truth which must strike the mind of every traveller on the continent, that the tone of the *parti prêtre* has been raised all over Europe by the results of the revolutionary struggle of 1848, and that a most vigorous attempt is making towards a general restoration of the authority of the church of Rome over the consciences of mankind. Again the church invokes the aid of the secular arm; and thoroughly conscious both of her strength and her weakness, she is casting off the mask of toleration, and putting her hope in the myriads of bayonets which the accidents of the time have brought to her aid. It has so happened that Florence has become the battle-field in the war between mind and matter, and it seems to be felt that to suffer the Madiai to be carried off would be the signal of defeat."

## Notices of New Books.[1]

UNITED STATES DIGEST. Containing a Digest of Decisions of the Courts of Common Law, Equity and Admiralty, in the United States and England. By JOHN PHELPS PUTNAM, of the Boston Bar. Vol. V. Annual Digest for 1851. pp. 621. Boston: Little, Brown & Co. 1852.

This volume, which has now been published for a considerable period, is the eleventh volume of the well-known United States Digest. Seven of the eleven volumes, in addition to the two volumes of the Equity Digest, have been published under the editorial supervision of Mr. Putnam. The advantages to be gained to a work of this kind, from the experience of successive years of labor upon successive volumes, is well shown by a comparison of this volume with some of the earlier ones of the Digest. The arrangement of a Digest is one of its most important features; and probably no one ever prepared a single volume of one Digest, or a single Digest in several volumes published at the same time, without seeing almost each day in what respects he could improve the arrangement were he to do it again. The editors of some of the earlier volumes necessarily labored under the want of experience in works of this kind. The wonder perhaps is, that they went through with the mass of reports that had then accumulated, so well as they did, in the time that was at their disposal. Mr. Putnam is now free of these difficulties. He has the benefit of years of experienced labor, and the annual crop of reports, so large as to make a digest indispensable, is yet not so large that he cannot reduce it within the compass of a reasonable volume. We think there is no modern Digest superior to this Annual Digest.

A distinctive feature of the present volume, and one which will be continued in the succeeding ones, is the incorporation therein of the decisions contained in the English Law and Equity Reports, edited by Bennett and Smith. Before it was a complete digest of all the reports in the United States; with this addition, we have in the volume a digest of all the decisions of all the courts both in England and in this country.

[1] A notice of Curwen's Statutes, and a list of New Publications received, is crowded out.

NOTICE. — The publication of the present number of the Reporter has been much delayed, from entirely unusual and unexpected causes. The next number will be published on the first of the month.

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## A LIST OF SOME OF THE LAW BOOKS

PUBLISHED IN THE UNITED STATES DURING THE YEAR 1852.

### TREATISES.

ANGELL AND AMES. A Treatise on the Law of Private Corporations Aggregate. By Joseph K. Angell and Samuel Ames. Fourth edition. Revised, corrected, and enlarged. pp. 862. $5.50. Boston: Little & Brown.

BARBOUR'S CRIMINAL LAW. A Treatise on the Criminal Law of the State of New York, and upon the Jurisdiction, Duty and Authority of Justices of the Peace, and incidentally of the Power and Duty of Sheriffs and Constables, &c. in Criminal Cases. By Oliver Lorenzo Barbour, Counsellor at Law. 1 vol. 8vo. pp. 870. Second edition. Albany: Gould, Banks & Co. New York: Banks, Gould & Co.

BINN'S JUSTICE. A Treatise on the Office and Duties of Aldermen and Justices of the Peace in the Commonwealth of Pennsylvania, including all the required Forms of Process and Docket-Entries, and embodying not only whatever may be deemed valuable to Justices of the Peace, but to Landlords, Tenants, and General Agents; and making this volume, what it purports to be, a Safe Legal Guide for Business Men. By John Binns, late Alderman of Walnut Ward in the City of Philadelphia. The fifth edition. Revised, corrected, and greatly enlarged, by Frederic C. Brightly, Esq., of the Philadelphia Bar, Author of "A Treatise on the Law of Costs." 1 vol. 8vo. pp. 719. Philadelphia: Kay & Brother. Price $5.

BISHOP ON DIVORCE. Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits. By Joel Prentiss Bishop. 1 vol. 8vo. pp. 702. Boston: Little, Brown & Co. London: William Maxwell. $4.50.

BROOM'S MAXIMS. A Selection of Legal Maxims, classified and illustrated. By Herbert Broom, Esq. Third American edition, from the second and much enlarged English edition. 8vo. pp. 607. Philadelphia: T. & J. W. Johnson. $4.

COOPER'S JUSTINIAN. The Institutes of Justinian, translated, with Notes. By Thomas Cooper, Esq. Third edition, with additional notes and references, by Andrew S. Garr, Esq., Counsellor at Law, New York. 1 vol. 8vo. pp. 725. $5.50.

EATON'S CHIPMAN ON CONTRACTS. An Essay on the Laws of Contracts for the Payment of Specific Articles. By Daniel Chipman. With a Supplement by D. B. Eaton, of the New York Bar. Burlington: Chauncey Goodrich.

FLANDERS ON MARITIME LAW. A Treatise on Maritime Law. By Henry Flanders. 1 vol. 8vo. pp. 444. Boston: Little, Brown & Co. $3 50.

GRAYDON'S FORMS. Forms of Conveyancing, and of Practice in the Courts of Common Pleas, Quarter Sessions, Oyer and Terminer, the Supreme and Orphans' Courts, and the Offices of the various Civil Officers, and Justices of the Peace. Fourth edition, revised, corrected, enlarged, and adapted to the present state of the law. With copious explanatary notes and references, by Robert E. Wright, Counsellor at Law. 1 vol. 8vo. pp. 629. Philadelphia: Kay & Brother. 1852. Price $3.50.

GREENLEAF ON EVIDENCE. A Treatise on the Law of Evidence By Simon Greenleaf, LL D., Emeritus Professor of Law in Harvard University. Vol. I: Sixth edition: pp. 768. Vol. II.: Fourth edition: pp. 708. Boston: Little, Brown & Co. $11.

KEYES ON REMAINDERS. An Essay on the Security of Remainders. By Wade Keyes, of the Montgomery Bar. Paper, 8vo. pp. 128. Montgomery, Ala.: Printed by J. H. & T. F. Martin.

LAW'S UNITED STATES COURTS. The Jurisdiction and Powers of the United States Courts, and the Rules of Practice of the Supreme Court of the United States, and of the Circuit and District Courts in Equity and Admiralty, with Notes and References, and an Appendix, containing the Orders of the High Court of Chancery of England in force in 1842, and the New Orders of the same court of 1845; and the times and places of holding the United States Courts. By Stephen D. Law, Counsellor of the Supreme Court of the United States. 1 vol. 8vo. pp. 815. Albany: Little & Co.

LUDLOW AND COLLINS'S ADAMS'S DOCTRINE OF EQUITY. The Doctrine of Equity, being a Commentary on the Law as administered by the Court of Chancery. By Jno. Adams, Jun., Esq Second American edition, with notes, and references to the latest American Chancery Decisions, by James R. Ludlow and Jno. M. Collins. 8vo. pp. 760. Philadelphia: T. & W. Johnson. 1852. $5.

RAWLE ON COVENANTS OF TITLE. A Practical Treatise on the Law of Covenants for Title. By William Henry Rawle. 8vo. pp. 596. Philadelphia: T. & J. W. Johnson. 1852. $4.50.

ROSCOE ON CRIMINAL EVIDENCE. A Digest of the Law of Evidence in Criminal Cases. By Henry Roscoe, Esq., of the Inner Temple, Barrister at Law. Fourth American, from the Third London Edition, with considerable additions; embracing all the recent alterations in the law, by T. C Granger, Esq. With additional Notes, and References to the American Decisions, and to the English Common Law and Ecclesiastical Reports, to the present time, by Hon. George Sharswood, President Judge of the District Court of the City and County of Philadelphia. New and enlarged edition. 1 vol. 8vo. pp. 1000. Philadelphia: T. & J. W. Johnson. 1852. $5.50.

SEDGWICK ON DAMAGES. A Treatise on the Measure of Damages, or an Inquiry into the Principles which govern the Amount of Compensation recovered in Suits at Law. By Theodore Sedgwick, Esq. Second edition, revised, re-written, and greatly improved. 1 vol. 8vo. pp. 710. New York: John S. Voorhies. $5.50.

SMITH'S MASTER AND SERVANT. A Treatise on the Law of Master and Servant, including therein Masters and Workmen in every description of Trade and Occupation, with an Appendix of Statutes. By Charles Manley Smith. Law Library edition, with notes, and references to American cases. 8vo. pp. 450. Philadelphia: 1852.

TAYLOR'S LANDLORD AND TENANT. A Treatise on the American Law of Landlord and Tenant, embracing the Statutory Provisions and Judicial Decisions of the several United States in reference thereto, with a selection of Precedents. Second edition, revised and enlarged. By John N. Taylor, Esq, Counsellor at Law. 1 vol. 8vo. pp. 704. Boston: Little, Brown & Co. $4.50.

VATTEL'S LAW OF NATIONS. The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns. Seventh American edition, from a new edition by J. Chitty. With Notes and References, by E. D. Ingraham, Esq. 1 vol. 8vo. pp. 650. Philadelphia: T. & J. W. Johnson. $4 00.

VOORHIES'S NEW YORK CODE OF PRACTICE. The Code of Procedure in Civil Actions, of the State of New York, as amended 1851 and 1852; with notes to each section, exhibiting the extent and effect of the recent amendments; the corresponding sections of the Codes of 1848 and 1849; the original wording of the several subsequent amendments: and references to, and extracts from, all the decisions, dicta, statutes, and rules of court construing or elucidating such section; together with a full and elaborate Index, and an Appendix containing the latest Rules of the several Courts. Second edition, revised, enlarged, and much improved. 1 vol. 8vo. pp. 600. New York: John S. Voorhies. 1852. $4.

WALKER'S COMMON LAW. A Theory of the Common Law. By James M. Walker Charleston, S. C. 1 vol. 8vo. pp. 130. Boston: Little, Brown & Co. $1.25.

WATERMAN'S EDEN ON INJUNCTIONS. A Compendium of the Law and Practice of Injunctions, and of Interlocutory Orders in the Nature of Injunctions. By the Hon. Robert Henley Eden, of Lincoln's Inn, Barrister at Law. With copious notes, and references to the American and English decisions. Also, an Introduction, and an Appendix of Practical Forms. By Thomas W. Waterman, Counsellor at Law. Third Edition. In two vols. 8vo. New York: Banks, Gould & Co. 144 Nassau St. Albany: Gould, Banks & Co 475 Broadway. 1852.

WENDELL'S STARKIE ON SLANDER. A Treatise on the Law of Slander and Libel, and incidentally of Malicious Prosecutions. By Thomas Starkie, of Lincoln's Inn, Barrister at Law. From the second English edition of 1830. With notes, and references to American cases and English decisions since 1830. By John L. Wendell, Counsellor at Law. Vol. 1. pp. 454. West Brookfield, Mass: O. S. Cooke & Co.

WHARTON'S AMERICAN CRIMINAL LAW. A Treatise on the Criminal Law of the United States: comprising a Digest of the Penal Statutes of the General Government, and of Massachusetts, New York, Pennsylvania, and Virginia; with the decisions on cases arising upon those statutes, and a general view of the Criminal Jurisprudence of the Common and Civil Law. By Francis Wharton, author of "Precedents of Indictments and Pleas." Second edition, greatly enlarged and improved. 1 vol. 8vo. pp. 983. Philadelphia: Kay & Brother. 1852. Price $7.

## REPORTS.

*American.*

BARBOUR. Reports of Cases in Law and Equity in the Supreme Court of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. IX. pp. 729. Vol. X. pp. 707. Vol. XI. pp. 706. Albany: Gould, Banks & Co. New York: Banks, Gould & Co.

BLATCHFORD. Reports of Cases argued and determined in the Circuit Court of the United States, for the Second Circuit. By Samuel Blatchford, Reporter of the Court. Vol. I. pp. 703. Auburn: Derby & Miller.

BRADFORD. Reports of Cases argued and determined in the Surrogate's Court of the City and County of New York, from March, 1849, to May, 1851. By the Hon. Alex. W. Bradford. Vol. I. pp. 580. New York: John S. Voorhies. $4.

COMSTOCK. Cases in Court of Appeals in the State of New York. By George F. Comstock. Vol. IV. pp 656. Albany: Little & Co.

CUSHING. Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Luther S. Cushing. Vol. IV. pp. 666; Vol. V. pp. 665. Boston: Little, Brown & Co. $5.

FLORIDA REPORTS. Vol. IV. pp. 511. By David P. Hogue.

FOSTER Reports of Cases argued and determined in the Supreme Court of Judicature of New Hampshire. By William L. Foster, Esq., State Reporter. Vol. I. pp. 632. Boston: Little, Brown & Co. Price $3.50.

GILL. Cases in Court of Appeals of Maryland. By Richard W. Gill. Vol. VI. pp 583, cases in 1847 and 1848, Baltimore. Vol. VII. pp. 554, cases in 1848 and 1849, Annapolis.

GRATTAN. Cases in the Supreme Court of Appeals and General Court of Virginia. By Peachy R. Grattan. Vol. VII. pp. 711, Richmond.

GREENE. Reports of Cases in Law and Equity, determined in the Supreme Court of the State of Iowa. By George Greene, one of the Judges. Vol. II. pp. 642. Cedar Rapids, Iowa.

GREENLEAF. Reports of Cases argued and determined in the Supreme Judicial Court of the State of Maine. By Simon Greenleaf, Counsellor at Law. With notes and references to subsequent decisions and statutes. New edition. By E H Bennett, Esq. 9 volumes in 8. 8vo. 1852. Boston: Little, Brown & Co.

HOWARD. Reports of Cases argued and determined in the Supreme Court of the United States, December Term, 1851. By Benjamin C. Howard. Vol. XII. pp. 620; Vol. XIII. pp. 652.

ILLINOIS. Cases in Supreme Court of Illinois. By E. Peck, Reporter. Vol. XII. pp. 586, Chicago. Vol. XIII. pp. 798. Boston: Little, Brown & Co.

MAINE REPORTS. Vol. XXXII. pp. 656. By Asa Redington, Reporter to the State. Hallowell: Masters, Smith & Co.

MISSISSIPPI REPORTS. Cases in High Court of Errors and Appeals. Vol. XXIII. pp. 753. By John F. Cushman. Vol. I. Boston: Little, Brown & Co.

MISSOURI REPORTS. Vol. XIV. pp. 625. By James B. Gardenhire, Attorney-General and Ex-officio Reporter.

MUNROE B. (Kentucky.) Vol XII. pp. 710, containing the cases decided at the Summer and Winter Term, 1851.

NEW YORK CODE REPORTS. New Series. Containing Reports of Cases decided in the several Courts of the State of New York upon the Code of Procedure, during the years 1851–52. Vol. I. pp. 450. New York 1852: John S. Voorhies. $2.50.

OHIO REPORTS. Vol. XX. pp. 633. By William Lawrence, Reporter. Columbus: Scott & Bascom.

PENNSYLVANIA STATE REPORTS. Cases in Supreme Court. Vol. XII. pp 419. By J. Pringle Jones, and R. C McMurtrie. Vols. XIII., XIV., XV. and XVI. By George W. Harris, State Reporter.

SANDFORD. Reports of Cases in the Supreme Court of the City of New York By Hon. Lewis H. Sandford, one of the Justices of the Court. Vol. IV. pp. 770. Albany: Little & Co.

WASHBURN. Reports of Cases argued and determined in the Supreme Court of Vermont. Vol. XXIII. New series. By Peter T. Washburn, Counsellor at Law. Vol. VIII. pp. 813. Woodstock, Haskell & Palmer.

WATTS. Reports of Cases argued and determined in the Supreme Court of Pennsylvania. By Frederick Watts, Counsellor at Law. Vol. 9. 8vo. pp. 605, September, 1839, to May, 1840. Vol X pp. 511, July to September, 1840; second edition. Philadelphia: Kay & Brothers. 1852 Price $6 per volume.

WOODBURY AND MINOT. Cases in the Circuit Court of the United States for the First Circuit. Vol. III pp. 567. Chas. C. Little and Jas. Brown.

## REPORTS.

*Republication of English.*

CROMPTON & JERVIS'S Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber, from 11 Geo IV. to 11 William IV. inclusive By Chas. Crompton and Geo. Jervis, Esqs. With references to the decisions of the American courts. J. J. Clark Hare and H. B. Wallace, editors 2 vols. 8vo. pp. 1322. Philadelphia: T. & J. W. Johnson $5.

CROMPTON & MEESON'S Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber from 3 William IV. to 4 William IV. inclusive. By Chas. Crompton and R. Meeson, Esqs. With references to the Decisions in the American courts. J. J. Clark Hare and H. B Wallace, editors. 2 vols. 8vo. pp. 1670. Philadelphia: T. & J. W. Johnson. $5.

CROMPTON, MEESON & ROSCOE'S Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber from Trinity Term, 4 Will. IV., to Hilary Term, 6 Will IV., both inclusive. By Charles Crompton, R. Meeson, & H. Roscoe, Esqs., Barristers at Law. With a Table of the cases, and references to decisions in the American courts. J. J. Clark Hare and H. B. Wallace, editors. 2 vols. pp. 1740. Philadelphia: T. & J. W. Johnson. $5.

ENGLISH COMMON LAW REPORTS. Volume 64, (pp. 1100, $2.50) containing Queen's Bench Reports Adolphus & Ellis's new series Vol. XII.—Volume 65 (pp. 990, $2.50) containing Common Bench Reports. Manning, Granger & Scott. Vol. VIII.—Volume 69, (pp. 1060, $2 50) containing Queen's Bench Reports. Adolphus & Ellis's new series. Vol. XV. Edited by Hon. George Sharswood. Philadelphia: T. & J. W. Johnson.

ENGLISH LAW AND EQUITY REPORTS. English Reports in Law and Equity, containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts, including also Cases in Bankruptcy and Crown Cases reserved. Edited by Edmund H. Bennett and Chauncy Smith, Esqs., Counsellors at Law.

Vol. VI. pp 652. Containing cases in courts of Equity and Common Law, and in the Ecclesiastical courts, during the year 1851

Vol. VII. pp. 660. Containing cases in the courts of Chancery, the court of Bankruptcy, and the courts of Common Law, during the year 1851.

Vol VIII. pp. 655. Containing cases in the House of Lords, in all the courts of Equity, Bankruptcy, and Common Law, and Crown Cases reserved, during the years 1851 and 1852.

Vol. IX. pp. 652. Containing cases in all the courts of Equity and Common Law, Crown Cases reserved, and cases in the Ecclesiastical and Admiralty courts, during the years 1851 and 1852.

Vol. X. pp. 658. Containing cases in all the courts of Equity and Common Law, during the year 1852. Boston: Little, Brown & Co. Price $2 per volume.

EXCHEQUER REPORTS. Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chambers. Vol. 5. Hilary vacation, 13 Vict. to Michaelmas vacation, 14 Vict., both inclusive. By W. N. Welsby of the Middle Temple, E. T. Hurlstone of the Inner Temple, and J. Gordon of the Middle Temple, Esqs., Barristers at Law. With references to decisions in the American courts J. J. Clark Hare and J. B. Wallace, editors. 8vo. pp. 1014. Philadelphia: T. & J. W. Johnson, Law Booksellers, No. 197 Chestnut Street. 1852. $2.50.

REPORTS of Cases Argued and Determined in the English Courts of Chancery. With notes and references to English and American decisions. By E Fitch Smith, Counsellor at Law. Vol. XXVII. pp. 632 Containing Hare's Chancery Reports. Vol. VII. New York: Banks, Gould & Co. Albany: Gould, Banks & Co. 1852.

## DIGESTS.

ANNUAL DIGEST. Digest of Decisions of the Courts of Common Law, Equity and Admiralty, in all the Courts of the United States and of the several States, for the year 1851. By John Phelps Putnam. 8vo.

POINDEXTER & SMITH. An Analytical Digest of the Decisions of the Court of Appeals of Kentucky; including the Reports of Hardin, 1 vol.; Bibb, 4 vols.; Alex. K. Marshall, 3 vols.; Littell, 5 vols.; T. B Monroe, 7 vols.; John J. Marshall, 7 vols.; Dana, 9 vols.; Ben. Monroe, 11 vols.; Littell's Select Cases, 1 vol.; and incorporating an Index to the New Code of Practice. By W. W. Fry, P. B. Poindexter, and S. B. Smith, Attorneys at Law. Cincinnati: H. W. Derby & Co.

GORDON. A Digest of the Laws of the United States, including the Treaties with Foreign Powers, and an Abstract of the Judicial Decisions relating to the Constitutional and Statutory Law. 4th Edition. 1 vol. 8vo. By Thomas F. Gordon. Philadelphia: Thomas, Cowperthwait & Co.

MINOT. Supplement to Minot's Digest; embracing all the reported Decisions of the Supreme Judicial Court of Massachusetts, from the third volume of Metcalf's Reports down to the time of publication, including the 13th Vol. of Metcalf, and the 3d of Cushing. 1 vol. 8vo. Boston: Little, Brown & Co.

WASHBURN. A Digest of all the Cases decided in the Supreme Court of the State of Vermont, as reported in vols 16 to 22, inclusive, of the Vermont Reports, together with many manuscript cases not hitherto reported, being a Supplement to the Digest of the previous volumes of the Vermont Reports. By Peter T. Washburn, Counsellor at Law. 1 vol. 8vo. pp. 630. Woodstock: Haskell & Palmer.

WHARTON. Wharton's Digest, Supplemental to the Edition of 1850; and bringing down the Cases to the period embraced in the aggregate edition above, namely, to the 4th Harris. By Henry Wharton, Esq. 1 vol. 8vo. pp. 550. Philadelphia: T. & J. W. Johnson. $4.

## STATUTES.

OHIO. The Public Statutes at Large of the State of Ohio: from the close of Chase's Statutes, February, 1833, to the present time. Arranged in chronological order, with references to the judicial decisions construing those statutes; and a supplement containing all laws passed prior to February, 1833, which are now in force. Edited by Maskell E. Curwen, of the Cincinnati Bar; one of the Professors of Law in the Cincinnati College. In three volumes. Cincinnati: E. Morgan & Co.

NEW YORK. The Revised Statutes of the State of New York, as altered by subsequent legislation; together with the unrepealed statutory provisions of a general nature passed from the time of the revision to the close of the Second Session of the Legislature in 1851. Arranged in the manner of the Revised Statutes. To which are added, all Acts of general interest passed during the Session of 1852, with references to judicial decisions in relation to their provisions, and explanatory notes. Prepared by Hiram Denio and William Tracy, Counsellors at Law. In two volumes, pp. 1293 and pp. 1126. Albany: Gould, Banks & Co. New York: Banks, Gould & Co.

STATUTES OF THE STATE OF NEW YORK, of a public and general character, passed from 1829 to 1851; both inclusive, with notes and references to judicial decisions, and the Constitution of 1846. Compiled and arranged by Samuel Blatchford, with a copious index by Clarence A. Seward. 1 vol. pp. 1165. Auburn: Derby & Miller.

UNITED STATES. The Statutes at Large, and Treaties of the United States of America, commencing with the First Session of the Thirty-Second Congress, 1851–1852, carefully collated with the originals at Washington. Edited by George Minot. 1 vol. 8vo. Printed uniformly with Little & Brown's edition of the Laws of the United States.

A SYNOPTICAL INDEX TO THE LAWS AND TREATIES OF THE UNITED STATES OF AMERICA, from March 4, 1789 to March 3, 1851. With reference to the edition of the Laws published by Biddle & Duane, and to the Statutes at Large, published by Little & Brown under the authority of Congress. Prepared under the direction of the Senate. 1 vol. 8vo. pp. 746. Boston: Little, Brown & Co.

## MISCELLANEOUS.

AMERICAN LEADING CASES. Being Select Decisions of American Courts, in several departments of law; with especial reference to Mercantile Law. With notes, by J. J. Clark Hare and H. B. Wallace. Third edition, enlarged and improved. In 2 vols. 8vo. Philadelphia: T. & J. W. Johnson. $10

COCKBURN'S LIFE OF JEFFREY. Life of Lord Jeffrey, with a Selection from his Correspondence. By Lord Cockburn, one of the Judges of the Court of Session in Scotland. In 2 vols. 8vo. pp. 343 and 368. Philadelphia: Lippincott, Grambo & Co.

LAW REFORM TRACTS. Nos. 1, 2 and 3 — 25 cents. Published under the superintendence of a Law Reform Association. New York: John S. Voorhies.

MEDICAL TESTIMONY. The Relations of the Medical Witness with the Law and Lawyer. By Samuel Parkman, M. D., one of the surgeons of the Massachusetts General Hospital. Read to the Boston Society of Medical Observation. 8vo. paper, pp. 11. Philadelphia: T. K. & S. G. Collins, Printers.

STORY. The Miscellaneous Writings of Joseph Story. Edited by his son, William W. Story. 1 vol. 8vo. pp. 828. Boston: Little, Brown & Co.

SMITH'S LEADING CASES. A Collection of Leading Cases on various Branches of Law, with notes, by John William Smith, Esq., from the third English edition, by H S Keating and J. S. Willis, Esqrs. Fourth American edition, with additional notes and references to American decisions, by J. J. Clark Hare and H. B. Wallace, Esqrs. 2 vols. 8vo. Philadephia: T. & J. W. Johnson. $10.

WEBSTER. The Works of Daniel Webster. 6 vols. 8vo. Boston: Little, Brown & Co. $12.

WHARF PROPERTY, or the Law of Flats; being Remarks before the Judiciary Committee of the Senate of Massachusets, April 14, 1852. 8vo. pp. 40. Boston: Printed by John Wilson & Son, 22 School street. 1852.

WHITE AND TUDOR'S LEADING CASES IN EQUITY. Leading Cases in Equity, with notes, by F. H. White and O D. Tudor, Esquires; with additional notes, and references to American Cases, by J. J. Clark Hare and H. B. Wallace Second American edition, with additional references. 3 vols. 8vo., Philadelphia: T. & J. W. Johnson. $12.

WOODBURY. Writings of Levi Woodbury, LL.D. Political, Judicial, and Literary, now first selected and arranged. In 3 vols. Boston: Little, Brown & Co. $6.

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## Obituary Notices.

DIED, in Lee, Mass., February 12, 1853, HON. WILLIAM PORTER, aged 61.

Mr. Porter was so generally known, throughout the county of Berkshire, and in other parts of the Commonwealth, that a professional friend deems it proper to present this brief and imperfect sketch of the life and character of one whose life of industrious and useful exertion has commanded respect and influence, and whose memory will be cherished with especial interest.

William Porter was born at Hadley, in the county of Hampshire, Mass., on the 14th of November, 1792. His family connections were highly respectable, and he enjoyed the advantages of a good early education, and intercourse with cultivated society. At the age of seventeen he entered Williams College, where he graduated in 1813. He subsequently pursued his professional studies, first, in the office of the Hon. Eli P. Ashmun at Northampton, and afterwards in the office of the late Hon. George Bliss at Springfield. With these advantages he became well grounded in the principles of law, and of legal practice, and acquired a high and just sense of the character and importance of his profession, and a thorough conviction of the necessity of continual and industrious labor, to its honorable and successful practice.

He opened an office in Lenox in 1817, where he remained about one year. He then removed to Lee, where he established himself for life For thirty-five years he was identified with the interests of that prosperous town. He held various public offices there, was ever relied upon to uphold and promote the interests of the town, and of all its useful institutions. His influence was decided and continual there, and always in favor of the institutions of religion, education and good morals.

In the years of 1828 and 1829 he represented that town in the House of Representatives. In 1835 and 1836, he represented the county in the Senate. In 1840 and 1841, he was a member of the Executive Council. From October, 1844, to May, 1851, he was the District Attorney for the Western District of Massachusetts, comprising the counties of Berkshire, Hampden, Hampshire and Franklin. He was, for a great number of years, one of the trustees of Williams College, and continually performed important duties connected with that office. Honorable sentiments, strict integrity and exemplary industry, have marked his professional career. Without the ambition of personal display, without pretension to extraordinary quickness of perception or power of eloquence, he always discharged his

professional and official duties successfully, respectably, and to the general satisfaction. The faculties of his mind were well balanced; diligently cultivated, and continually strengthened by the pervading industry, which every day of his life exhibited. He was a safe counsellor, a prudent, discreet and faithful friend; and a strong, resolute and able advocate of every cause, which he deemed right and just. He was fixed, consistent and stable in his opinions, perhaps rather remarkably conservative, but willing to yield with care and prudence to the spirit of progress.

In the year 1835, he was a member of the Committee to whom was referred the Report of the Commissioners, who prepared the Revised Statutes of this Commonwealth. He was an able, industrious, and useful member of that Committee, as well as of the Senate. While a member of the House of Representatives, he sustained a high character and a good influence; and on several occasions his speeches in that body were attended with decided effects.

In his disposition he was genial and pleasant. He was well contented with his situation, and with the public employments assigned to him. His conscience was enlightened and active; his faith in the atonement of his Divine Redeemer was sincere and practical, and humbly and hopefully he fulfilled the duties of life to the end.

Mr. Porter was twice married. His second wife, and several children by his first wife, survive him.

In Paris, France, Horace Binney Wallace, Esq., of Philadelphia, aged 35.

Just before the sailing of a late steamer from Liverpool, a telegraphic despatch from our minister at Paris announced the sudden and painful death of Mr. Wallace in that city. This death is rendered the more distressing by the knowledge that a diseased cerebral action led to a temporary disturbance of his reason.

The resolutions passed by the Bar of Philadelphia, expressive of more than usual sorrow and respect, the notices in the secular and religious papers of New York and Philadelphia, and a pamphlet obituary prepared by one of the eminent jurists and statesmen of our day, as well as the grief of an uncommonly large circle of friends, show that this has been the death of no ordinary man; especially when we consider that he died at the age of thirty-five, and in no public office or connection.

Mr. Wallace was born in Philadelphia, in 1817, and educated at Princeton College. His mother, a sister of the distinguished citizen whose name he bore, was a woman of a high style of mind and manners. At college, he was distinguished as a mathematician and a Greek scholar. The late Professor Dod, of that institution, said of him, "He was the most extraordinary young man I ever knew. He seemed to read and know every thing. His superiority and modesty alike attracted my attention, on all occasions." Before the age of twenty, he projected a new theory of comets, which, though subsequently abandoned by him, showed originality and skill, and his Greek studies he continued to the last. Being in circumstances of independence, he spent a good deal of time in foreign travel, and it is purposed to publish his note-book of observations, carefully made by him on the great subjects of fine arts, manners, social systems, and the developments of religious and political character and institutions in Europe.

But it is chiefly as a lawyer that we are to notice the deceased. He is known as the author (in connection with his friend Judge Hare) of the American notes to Smith's Leading Cases in Law, and to White & Tudor's Leading Cases in Equity, and of the later and yet more valuable work, (also in connection with Judge Hare) on American Leading Cases. These works evince a thoroughness, a logical precision, as well as a fertility of analogies and illustrations,—in short, the mind of the true legal philosopher, which have given them an assured rank in all States of the Union, and repeatedly exhausted the publisher's supply. And these were prepared before the age of thirty.

To the profession, therefore, the early death of such a man is a great loss. A laborer, in obedience to the great law that genius will labor, and not from the ordinary pressures which lead to so much book-making, the profession could place implicit reliance on his natural thoroughness and pride of character, as well as conscientious regard to duty. And his developing powers of mind and increasing acquisitions gave assurance of yet brighter things to come.

Yet it is fair to say that these works alone do not account for the extraordinary manifestations from high quarters, called forth by his death. He was also known as a writer, almost always anonymously, in our leading journals, on subjects philosophical, literary and theological, and the value and power of his pen had become known among literary men. The dedication to him of Griswold's Collection of American Prose Writers was an expression of the general feeling enter-

tained towards him by the younger class of authors. The New York Churchman, and the Register, a church paper published in Philadelphia, have borne testimony, since his death, to his religious and theological character and opinions, and the Literary World, to his literary rank and merit. Nor is this all. The high and general character of the response is also attributable to the fact that Mr. Wallace impressed himself on all men whom he met, and especially on leading minds capable of directing public opinion. There was that rare and unmistakable fineness of temper, denoting the true metal, that moral and intellectual elevation, showing itself in manner and conversation, in a way which the high-minded cannot mistake, and the vulgar and commonplace cannot imitate, which gave him a place in the affections and respect of those whose respect and affection for the most part determine the rate of public estimation.

So many of the lights of the profession have been men whose minds and characters, out of their professional track, are unmarked and uninteresting, that we are proud to rank a character like that of Mr. Wallace among the legal writers of America.

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## Insolvents in Massachusetts.

| Name of Insolvent. | Residence. | Commencement of Proceedings. | Name of Commissioner. |
|---|---|---|---|
| Abbott, C. F. | West Cambridge, | Nov. 20, | Bradford Russell. |
| Abbott, Joseph B. | Cambridge, | " 20, | Bradford Russell. |
| Adam, William F. | Newton, | Jan. 8, | Asa F. Lawrence. |
| Austin, William | Gardner, | " 8, | Charles Mason. |
| Block, Nathan M. | Newburyport, | " 28, | Daniel Saunders, Jr. |
| Brewster, Jonathan | Northampton, | " 28, | Haynes H. Chilson. |
| Chapman, Daniel | Haverhill, | " 7, | John G. King. |
| Chase, Freeman | Athol, | " 1, | Charles Mason. |
| Chipman, Andrew M. et al. | Salem, | " 27, | John G. King. |
| Chipman, Eleazer M. et al. | Salem, | " 27, | John G. King. |
| Clark, Samuel B. | Boston, | " 12, | Frederic H. Allen. |
| Cowing, William L. | Worthington, | " 14, | Haynes H. Chilson. |
| Doane, Francis C. | Medford, | " 7, | Asa F. Lawrence. |
| Farwell, Orlen | Charlestown, | " 24, | Frederic H. Allen. |
| Fish, Moses W. | Cambridge, | " 1, | Frederic H. Allen. |
| Fisher, Lamard | Dana, | " 21, | Charles Brimblecom. |
| Folsom, James B. | Charlestown, | " 6, | Asa F. Lawrence. |
| Fuller, Ezra Jr. | Needham, | " 8, | William S. Morton. |
| Granville, Stephen | Danvers, | " 3, | John G. King. |
| Golding, Robert P. | Boston, | " 19, | Bradford Sumner. |
| Horton, Owen S. | Attleborough, | " 16, | E. P. Hathaway. |
| Keith, Lucius A. | North Bridgewater, | " 27, | Perez Simmons. |
| King James L. | Hopkinton, | " 21, | Asa F. Lawrence. |
| Knowles, Thomas | Boston, | " 25, | Frederic H. Allen. |
| Lane, Levi | Gloucester, | " 26, | John G King. |
| Lindsay, Richard | Salem, | " 3, | John G. King. |
| Pickering, Paul R. | Newburyport, | " 3, | Daniel Saunders, Jr. |
| Poole, Alexis | Boston, | " 21, | John M. Williams. |
| Savage, Andrew J. | Charlestown, | " 21, | Asa F. Lawrence. |
| Sawyer, Jonathan | Shirley, | " 26, | Bradford Russell. |
| Shattuck, George W. | Acton, | " 15, | Asa F. Lawrence. |
| Shepard, Calvin | Taunton, | " 21, | E. P. Hathaway. |
| Shippee, Jesse C. | Greenfield, | " 18, | D. W. Alvord. |
| Slocum, James | Boston, | " 12, | John M. Williams. |
| Smith, E. H. | Mariboro', | Dec. 9, | Bradford Russell. |
| Stearns, Thomas | Malden, | Jan. 24, | Asa F. Lawrence. |
| Titus, Alden W. | Boston, | " 31, | Bradford Sumner. |
| Treat, Samuel G. | Waltham, | " 13, | Asa F. Lawrence. |
| Tyler, Charles M. | Cambridge, | " 1, | Frederic H Allen. |
| Tyler, Leslie | Adams, | Feb. 9, | Thomas Robinson. |
| Vinton, Horace H. | Needham, | Jan. 18, | Bradford Russell. |
| Whall, George F. | Newton, | " 7, | Bradford Russell. |
| Whittemore, Elbridge G. | Ashland, | " 7, | Bradford Russell. |
| Wiggin, Daniel G. | Melrose, | " 18, | Bradford Russell. |
| Willard, William | Somerville, | " 3, | Bradford Russell. |
| Williams, Albert | Williamstown, | " 26, | Thomas Robinson. |
| Williams, Benjamin D. | Mendon, | " 18, | Henry Chapin. |